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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 1079.

JOHN L. STREET, APPELLANT,

vs.

E. P. FERRY.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF UTAH.

FILED OCTOBER 6, 1886.

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1 (*Complaint.*)

TERRITORY OF UTAH, } ss:
County of Salt Lake, }

In the District Court, Third Judicial District.

EDWARD P. FERRY, Pl'f, *vs.* JOHN L. STREET, Def't.

Said plaintiff complains of said defendant, and for his cause of action alleges—

That on the first day of August, 1880, he was seized in fee and possessed and entitled to the possession of those certain tracts or lots of land situated in Park City, in the county of Summit, Territory of Utah, and described as follows: Lots fifteen (15) and sixteen (16), of block twenty-two (22), the southerly half of lot one (1), of block twenty-three (23), and lot B.

That while the plaintiff was so seized the defendant afterwards, to wit, on the 2nd day of August, 1880, and without right or title, entered into possession of the demanded premises and ousted and ejected plaintiff therefrom and now unlawfully with-olds the possession thereof from the plaintiff, to his damage in the sum of five hundred dollars.

2 That the value of the rents, issues, and profits of said premises from the said 2nd day of August, 1880, and while the plaintiff has been excluded therefrom by the defendant, is five hundred dollars.

Wherefore the plaintiff prays judgment against the defendant—

For the recovery of the possession of the demanded premises and for the sum of five hundred dollars, damages for withholding the possession thereof.

For the sum of five hundred dollars, the value of the said rents, issues, and profits, and costs of suit.

D. C. McLAUGHLIN,
Att'y for Pl'ff.

TERRITORY OF UTAH, } ss:
County of Salt Lake, }

Edward P. Ferry, the plaintiff in the suit above entitled, being duly sworn, deposes and says that he has read the foregoing complaint and that the same is true.

EDW'D P. FERRY.

Subscribed and sworn to before me this 18th day of May, 1882.

[SEAL.] H. G. McMILLAN,
Deputy Clerk 3rd District Court, Utah Territory.

(Endorsed:) Title of court and cause. Complaint. Filed May 18th, 1882. O. J. Averill, clerk, by H. G. McMillan, deputy clerk.

3 *Answer.*

In the District Court of the Third Judicial District of Utah Territory.

EDWARD P. FERRY, Plaintiff, *vs.* JOHN L. STREET, Defendant.

Now at this day comes the defendant and answers to the complaint and denies:

That on the first day of August, 1880, or at any other time, the plaintiff was seized in fee or otherwise, or was possessed or was entitled to the possession of those certain tracts or lots of ground described in the complaint, or any part or parts of the same, or that plaintiff had any right or interest in the same, or in or to the possession thereof, or of any part thereof; denies that while plaintiff was so seized or at all seized, or possessed, the defendant, on the 2nd day of August, 1880, or at any other time, without right or title or otherwise, entered in possession of said demanded premises, or of any part thereof, or ousted or ejected plaintiff therefrom; denies that defendant now unlawfully withholds the possession thereof, or of any part thereof, from the plaintiff, or that he did so withhold said possession at the commencement of this action, or at any
4 other time; denies that said alleged withholding is or has been to the damage of the plaintiff in the sum of five hundred dollars, or in any other sum, or at all; denies that the value of the rents, issues, and profits of said premises from the 2nd day of August, 1880, or while the plaintiff has been excluded by the defendant, is five hundred dollars, or any sum greater than one hundred dollars.

Defendant, for further answer and defence, alleges that on or about the 1st day of November, 1874, said premises were within the limits of the town of Park City, but otherwise were open, unappropriated, and unoccupied public land of the United States, and that at said last-named date this defendant entered into and upon said premises and occupied and possessed the same; that the defendant has continuously from said last-named date occupied, appropriated, and used the same, and still continues so to do; that said plaintiff neither on the 1st day of August, 1880, nor at any other time, was ever in possession or occupancy of said premises, or of any part thereof; nor did plaintiff, his predecessors or grantors, ever live upon, occupy, or cultivate any portion of said land.

Defendant, for other and further answer, alleges, upon his information and belief, that the plaintiff has no right nor title to said
5 premises, nor to any part thereof, nor to the possession of any part thereof, and has no claim of right or title, except by and through a certain patent issued by the United States on or about the 26th day of February, 1877, to one Frederick A. Nims; that said patent is fraudulent and void, and was procured by said Nims by fraud upon the United States and upon defendant and other occupants of said land embraced within said patent, and said fraud was committed as follows, viz: That on or about the 31st day of August, 1876, said Nims applied at the United States land office in Salt Lake

City to make entry of and purchase from the United States and to obtain a patent from the United States for the southeast quarter of the southeast quarter of section sixteen (16), of township two (2) south, range four (4) east, of Salt Lake meridian; also the northwest quarter of the southeast quarter of same section; also northeast quarter of the southeast quarter of same section, and the northeast quarter of the northeast quarter of section twenty-one of same township and range; that the premises described within the complaint were embraced within the lands thus sought to be purchased and patented; that said application to purchase and obtain patent
6 by said Nims was under and by virtue of an act of Congress of the United States entitled "An act for the relief of Thomas B. Valentine," approved April 5, 1872; that in thus seeking to purchase and obtain patent for said land said Nims falsely and fraudulently pretended and represented to the executive officers of the United States, the officers of said land office, and others that said lands thus sought to be by him purchased and to him to be patented *was* not mineral, and *was* unoccupied and unappropriated public lands of the United States, and subject to private entry and purchase by him *by him*, said Nims, under said act of Congress, by his paying therefor scrip that had been issued, or purported to have been issued, to said Valentine under said act of Congress, whereas, in truth and in fact, all of said land thus sought to be purchased by said Nims was at that time occupied, appropriated, and used by various parties for town purposes, for residences, dwellings, business houses, mining, and other improvements and uses; that the town of Park City was laid out, platted, and located upon said ground sought thus to be purchased; that said land was essentially mineral in character, and contained valuable deposits of gold, silver, lead, and other valuable minerals, and such valuable minerals, had prior to said applica-
7 tion by said Nims to purchase been discovered upon and in said grounds to which he was thus seeking Govenment title; that all of these facts were well known to said Nims at the time he so falsely and fraudulently made said representations and sought to purchase said lands; that upon the first opportunity various interested parties, including this defendant, filed their protests against said patents being issued to said plaintiff, and filed the affidavits of reliable witnesses with the officers of the land office at Salt Lake City, showing and proving the mineral character of said land, and that the same was occupied and appropriated by other parties, including this defendant; that said affidavits, after filing thereof as aforesaid, were unlawfully and fraudulently, by the consent, connivance, and procurement of said Nims, abstracted from the files and suppressed and concealed from the executive officers of the Government, and the said Nims fraudulently concealed from the executive officers of the Government the true character of said land, and that — same was mineral and was occupied and appropriated at that time by other and adverse claimants thereof; that the officers of said land office and the other executive officers of the Government were deceived by said fraudulent representations and concealments of said
8 Nims into allowing, and they did allow, said Nims to enter and

purchase said lands, and he was by the United States Government, by reason of said fraudulent representations and concealments on the part of said Nims, granted a patent for said land; that all of the aforesaid facts, fraudulent representations and concealments, and that said patent was fraudulent and void were well known to the plaintiff at the time he purchased and acquired the title of said Nims to said land and every other title or claim to said land.

Defendant further alleges, as further answer to said complaint, that said premises claimed and described in the complaint are upon section sixteen, and not subject to entry and purchase as Government agricultural land, nor subject to be purchased with or by said Valentine scrip or any other scrip.

Wherefore defendant prays that the said patent of said Frederick A. Nims be annulled and declared void, and that the plaintiff be perpetually enjoined from enforcing — same against said premises, and that defendant may have such other and further relief as to the court may seem just, and he have judgment for his costs.

JACOB L. BOREMAN,
Att'y for Defendant.

9 TERRITORY OF UTAH, } ss:
County of Summit, }

John L. Street, being sworn, deposes and says: I am the defendant in the above-entitled action; I have read the foregoing answer and know the contents thereof, and that the same is true of my own knowledge, except as to those matters therein stated on information and belief, and as to those matters I believe it to be true.

JOHN L. STREET.

Subscribed and sworn to before me this 13th day of June, 1882. Witness my hand and official seal at office in Park City, Summit county, Utah Territory.

F. W. HOYT, [NOTARY SEAL.]
Notary Public.

(Endorsed:) Title of court and cause. Answer filed June 14, 1882. O. J. Averill, clerk, by H. G. McMillan, deputy clerk.

I hereby accept service of the within answer made this 15th day of June, 1882, by a copy thereof being on said day delivered to me and served upon me.

Dated 15th day of June, 1882.

D. C. McLAUGHLIN,
Att'y for Plaintiff.

10 (*Finding.*)

In the District Court for the Third Judicial District of the Territory of Utah, County of Salt Lake.

EDWARD P. FERRY, Plaintiff, *vs.* JOHN L. STREET, Defendant.

This cause having, on the — day of ——, 1883, been regularly called for trial before the court without a jury, a jury having been

by the stipulation of the parties in open court especially waived, Arthur Brown, D. C. McLaughlin, and Jabez G. Sutherland appeared as counsel for plaintiff, and Boreman and Denny appeared as counsel for defendant, and the cause having been heard upon the complaint in said case, the equitable defense set up by way of answer to the answer, and the answer to the original case, the court now makes the following findings of fact and conclusions of law, to wit:

Findings of Fact.

1st. That in October, 1875, one Frederick A. Nims having purchased of Thomas B. Valentine scrip entitling him to enter forty acres of unappropriated land of the United States, applied at the United States land office to purchase forty acres of unsurveyed land of the United States, which, when afterwards surveyed,
11 constituted the following-described piece of land, to wit: The northeast quarter of the southeast quarter of section sixteen, in township two south, of range four east, in the district of lands subject to sale at Salt Lake City, Utah Territory, containing forty acres.

2nd. That thereafter such proceedings were had in said land office by said Frederick A. Nims that on the 26th day of February, A. D. 1877, the Government of the United States granted by its duly executed patent, under the seal of the General Land Office and the signature of the President of the United States, the said land last above described; that said land includes and comprises the land in controversy in this suit, to wit, lots fifteen and sixteen of block twenty-two, the southerly half of lot one of block twenty-three, and lot "B," situated in Park City, in the county of Summit and Territory of Utah, and described in the complaint herein.

3rd. That by subsequent conveyances the said plaintiff, Edward P. Ferry, before the commencement of this suit, to wit, on the first day of August, 1880, became the owner, through said Frederick A. Nims, of said title thus acquired by said Frederick A. Nims from the Government of the United States.

4th. That on the first day of August, 1880, the said Ed-
12 ward P. Ferry was seized in fee and possessed and entitled to the possession of the premises last above described.

5th. That said defendant, on the 2nd day of August, 1882, without right or title, entered into possession of the demanded premise and ousted and ejected the plaintiff therefrom, and at the date of the commencement of this suit and of the trial of this case unlawfully withheld the possession thereof from the plaintiff.

6th. That the value of the rents and profits of said demanded premises, during the time that said defendant has unlawfully withheld possession thereof from the plaintiff, is the sum of five hundred dollars, and said plaintiff is entitled to said sum of five hundred dollars damages for such unlawful withholding.

7th. The court further finds that, as to the various matters set up by way of equitable defense in the answer in this action, *that* the said defendant is not entitled to plead the same in his behalf, and

no proof was admitted or introduced tending to show the truth of said allegations.

Conclusions of Law.

Said plaintiff is entitled to recover possession of the premises in controversy, to wit, lots fifteen and sixteen of block twenty-two, the southerly half of lot one of block twenty-three, and
13 lot "B," situated in Park City, in the county of Summit and Territory of Utah, and is entitled to recover the sum of five hundred dollars for damages for the unlawful withholding of the same by defendant, and judgment is hereby ordered to be entered accordingly, together with the costs of this suit, to be taxed.

By the court:

JOHN A. HUNTER, *Judge.*

Dated Dec'r 29th, 1883.

(Endorsed:) Title of cause. Findings. Filed Dec'r 29th, 1883. O. J. Averill, clerk, b- H. G. McMillan, deputy clerk.

14 (*Judgment.*)

In the District Court for the Third Judicial District of Utah Territory, Salt Lake County.

EDWARD P. FERRY, Plaintiff, *vs.* JOHN L. STREET, Defendant.

This cause coming on for trial at the September term, 1883, of said court, on the 22nd day of November, and the same having been tried before the court sitting without a jury, Mess. Arthur Brown and D. C. McLaughlin, attorneys for plaintiff, and Mess. Boreman and Denny, attorneys for defendant, being present and ready for trial, and both plaintiff and defendant having introduced each their testimony and evidence and made their proofs, and the case having been argued by counsel and submitted to the court, and the court having fully considered all and singular the allegations and proofs of the parties, and having filed its findings of fact and its conclusions of law in writing, orders that judgment be entered herein in favor of plaintiff and against defendant accordingly. It is therefore ordered, adjudged, and decreed by the court that on the first day of August, 1880, the plaintiff was, and ever since has been, and now is,
15 the owner and entitled to the possession of those certain tracts or lots of land situated in Park City, Summit county, Utah Territory, and described as follows: Lots fifteen (15) and sixteen (16) of block twenty-two (22), the southerly half of lot one (1) of block (23), and lot "B," and that the defendant entered upon the same unlawfully and unlawfully withholds the possession thereof from plaintiff; and it is further ordered, adjudged, and decreed that plaintiff do have and recover of said defendant the possession of said above-described premises, with damages in the sum of five hundred $\frac{00}{100}$ dollars, with interest thereon from the date hereof until paid, together with plaintiff's costs in this behalf expended and taxed at the sum of $—.

Judgment entered November 24th, 1883.
A true copy of judgment entered.
Attest: H. G. McMILLAN,
Deputy Clerk.

16 (*Notice of Motion for New Trial.*)

In the District Court of the Third Judicial District, Territory of Utah, County of Salt Lake.

EDWARD P. FERRY, Pl'ff, *vs.* JOHN L. STREET, Def't.

To the plaintiff, Edward P. Ferry, and to D. C. McLaughlin, Arthur Brown, an- J. G. Sutherland, attorneys for said plaintiff.

GENTLEMEN: You will please take notice that on the first day of February, 1884, at the opening of court on that day, or as soon thereafter as counsel can be heard, at the Federal court-room, Salt Lake City, Utah, the defendant will move the court to vacate and set aside the decision and judgment of the court hereinbefore entered against defendant and in favor of plaintiff, on the 24th day of November, 1883, and to award to the defendant herein a new trial on the following grounds:

1st. Insufficiency of the evidence to justify the judgment and decision of the court.

2nd. That said decision and the judgment thereon are against law.

3rd. Errors in law occurring at the trial and excepted to by the defendant.

BOREMAN & DENNY,
Atty's for Defendant.

(Endorsed:) Title of court and cause. Notice of intention to move for a new trial. Due service of the within motion ad-
17 mitted this 14th day of January, 1884. Arthur Brown, attorney for plaintiff. Filed January 14th, 1884. O. J. Averill, clerk, by H. G. McMillan, deputy clerk.

Motion for New Trial.

In the Third Judicial District Court, Territory of Utah.

EDWARD P. FERRY *vs.* JOHN L. STREET.

To E. P. Ferry, pl'ff, and D. C. McLaughlin, Arthur Brown, and J. G. Sutherland, attorneys for plaintiff:

Now comes said defendant and moves the court to vacate the decision and judgment heretofore rendered in the above suit on November 24th, 1883, and to grant a new trial herein on the following grounds:

First. Insufficiency of the evidence to justify the judgment and decision of the court.

Second. That said decision and the judgment thereon are against law.

Third. Errors in law occurring at the trial, and excepted to by the said defendant at the time, and particularly specified in the statement herein on motion for a new trial by defendant, and herewith filed.

18 BOREMAN & DENNY,
Att'ys for Defendant.

(Endorsed:) Title of court and cause. Motion for new trial. Filed January 14th, 1884. O. J. Averill, clerk, by H. G. McMillan, deputy clerk.

19 *Statement on Motion for New Trial.*

In the District Court of the Third Judicial District, Territory of Utah, County of Salt Lake.

EDWARD P. FERRY, Pl'ff, *vs.* JOHN L. STREET, Def't.

This is an action of ejectment for certain lots or tracts of land situated in Park City, in the county of Summit, Territory of
20 Utah, as alleged in the complaint, and described as follows: Lots fifteen (15) and sixteen (16) of block twenty-two, the southerly half of lot one (1) of block twenty-three (23), and lot "B."

The cause being regularly called was tried before the court without a jury (a jury being waived) on the 22d, 23d, and 24th days of November, 1883.

The following evidence was introduced, and the following statement on motion for new trial embraces all of the material evidence produced upon the trial.

Plaintiff offered in evidence what purported to be a United States patent for the northeast quarter of the southeast quarter of section sixteen (16), township two (2) south, of range four (4) east, Utah Territory. A copy of said patent is as follows, to be engrossed, and is annexed hereto as Exhibit "A," and made part of this statement, to the introduction of which patent the defendant objects on the following grounds:

1st. It does not appear that the land mentioned in the said patent includes the land in question and described in the complaint. To said objections plaintiff stated he would prove it to be the same land.

2d. That said patent is void upon its face, and conveys no title whatever to plaintiff, it being upon section sixteen (16), township two (2) south, range four (4) east, which is and was at the time of issuing the patent by Congress reserved and appropriated for school purposes, and was not subject to location by Valentine scrip, and was therefore irrelevant, incompetent, and immaterial; which objection was by the court overruled and said patent admitted in evidence; to which ruling the defendant excepted.

Plaintiff then offered in evidence a deed from T. W. Ferry and Frederick A. Nims to plaintiff, which was by defendant objected to on the ground that it purports to convey section sixteen (16), which is school land and reserved from sale, and no authority is shown or title to be in the said pretended grantors or either of them; as to

T. W. Ferry it is irrelevant, incompetent, and immaterial, as it does not appear that he has any title thereto or interest therein; objection overruled and deed admitted; to which ruling the defendant duly excepted.

21 BROOKS, being called as a witness for plaintiff, testified on the part of plaintiff, as follows:

I am a civil engineer and deputy United States mineral surveyor. I have made surveys around Park City; lots fifteen and sixteen in complaint described are in the northeast quarter of the southeast quarter of section sixteen, township two south, range four east, Salt Lake City meridian, Territory of Utah. I made a private survey October 12, 1875, for Mr. Nims.

Question objected to by defendants as irrelevant, incompetent, and immaterial, and hearsay.

Plaintiff offers to show that the survey was made before the United States survey. Objected to as irrelevant, incompetent, and immaterial. Objection overruled; to which defendant duly excepted.

Plaintiff asks the following question: Do you know the date of that United States survey?

Objected to by defendant as irrelevant, incompetent, and immaterial; not the best evidence; the record is the best evidence. Objection overruled; to which the defendant duly excepted.

Answer. August the 25th, 1876. I was at that time a deputy United States surveyor; made the official survey for said section and know the date thereof.

Cross-examination:

Q. How many surveys of the premises in question did you ever make?

A. Three or four. They were all made for Mr. Nims; they all corresponded, but were for different purposes. I surveyed them in 1875, for marking off certain lots of ground in 40-acre blocks. The second survey was made because the first was not official and the second was. The third survey was for laying out roads and lots—city lots.

Q. Was all of the quarter-section laid out?

A. Eighty (80) acres were laid out in lots.

Q. Were these eighty (80) acres all in section sixteen?

A. Yes; and all surveyed and laid out in city lots. There were about three hundred or four hundred people living on these lots or premises at the time. The third survey was in 1877, or

22 1878. The northern line of section sixteen was officially run in 1875. When I made the first survey the northeast and northwest corners of section sixteen were established; also the northern line of section sixteen. Section nine had been surveyed and the corners established by the Government. I knew from the survey where section sixteen was, when the corners of section nine were

established. I was obliged to start from the southeast and southwest corners of section nine (9) to make my survey of section sixteen. The north line of section sixteen had been run and the corners established, and from that it could be easily ascertained where section sixteen was.

J. G. SUTHERLAND was called and testified on behalf of the plaintiff, as follows:

That he first ordered the survey made for the purpose of locating the land for defendant. That from the survey of section nine he knew that the land in question, upon which he wished to make the location, was on section sixteen, and he ordered the survey to be made. I gave this direction for survey in October, 1875, and at the same time filed Valentine scrip with the register of land office at Salt Lake City, Utah, and left it with him as payment for this land.

E. P. FERRY, plaintiff, being called as a witness, testified:

I first came to Park City in 1874; knew of defendants being on these premises in 1878. The rental value is twenty dollars per month.

Evidence on the part of the Defendant.

JOHN L. STREET, the defendant, testified as follows:

I reside in Park City, Utah district. I was upon the land in controversy in November, 1874—built a house thereon and have resided on the same ever since; it is within Park City.

The following question was put to the witness by defendant's counsel:

Q. What was the population of Park City in 1874, at that time?

Objected to by plaintiff as irrelevant, incompetent, and
23 immaterial. Objection sustained; to which ruling defendant duly excepted.

Defendant then offered to prove that the lands described in the complaint and in dispute were settled upon and occupied as a townsite in 1874, and ever since have been so occupied, and for the purposes of trade and commerce, being on the northeast quarter (¼) of the southeast quarter (¼) of section sixteen (16), and that Park City had a population in 1874 and 1876 of about four hundred or five hundred people.

To the proving of which facts the plaintiff objected on the ground that the same were irrelevant, incompetent, and immaterial. Objection sustained; to which ruling defendant duly excepted.

The following question was put to the witness by defendant's counsel:

Q. State whether or not the lands embraced within the patent and on the northeast quarter (¼) of the southeast — (¼) of section sixteen, being the lands in controversy, are mineral lands.

Objected to by plaintiff's counsel on the ground that the question was incompetent, irrelevant, and immaterial, which objection was sustained; to which ruling of the court defendant then and there excepted.

The following question was put to the witness by defendant's counsel:

Q. State whether or not you are interested in any mining claims or locations embraced in the premises in controversy and described in the complaint.

Which question was objected to by plaintiff on the ground that the question was incompetent, irrelevant, and immaterial, and which objection was sustained by the court; to which ruling of the court defendant then and there excepted.

Defendant then offered to prove that the lands on the northeast quarter (¼) of the southeast quarter (¼) of section sixteen, township two south, range four east, Salt Lake meridian, Utah, a part of which lands are in controversy, are mineral lands, and valuable for mineral purposes; that a number of mining claims have been located on said lands, to wit, Creole, Dugway, Midias, and others, and were known to be mineral lands when application for patent was made, and known.

24 To the proving of said facts the plaintiff objected on the ground that the same was irrelevant, incompetent, and immaterial, which objection was sustained, and to which ruling of the court defendant then and there excepted.

Defendant's counsel then asked the following question:

What is the value of improvements which you have placed upon the premises in dispute?

To which plaintiff objected on the ground that no claim was set up in the answer by which the court could allow the value of the improvements to be set up against any damages which plaintiff may have sustained; to which ruling of the court defendant then and there duly excepted.

Defendant then asked the court to amend his answer, showing that defendant had been in possession of said premises since 1874; had resided thereon, and made valuable improvements thereon; that his claim was under claim of right and title, and made in good faith, believing he had the right and title thereto.

That defendant offered to prove the above facts and the value of the improvements, which were objected to by plaintiff on the ground that said facts did not constitute a holding under color of title, and were incompetent, irrelevant, and immaterial; which objection was sustained; to which ruling of the court the defendant then and there objected and excepted.

The case being then submitted to the court, the court rendered judgment in favor of plaintiff for the possession of said premises and for five hundred dollars damages.

Specification of Errors.

Now, upon the foregoing statement and the matters therein contained, defendant assigns as error herein made to appear by the foregoing statement the following:

First.

That the evidence was insufficient to justify the decision of the court in this:

First. That there was no evidence that plaintiff ever acquired or was in the possession of the demanded premises or ever appropriated any part thereof to his use.

Second. There was no evidence that plaintiff was ever seized in fee or otherwise, or possessed or entitled to the possession, of the premises described in the complaint, or any part thereof.

Third. That there was no evidence that plaintiff had any title, right, or claim to the said premises.

Fourth. It appears from the evidence that the lands sued for were not public unappropriated public lands, but were occupied and reserved from sale by the laws of Congress at the time of location and of patent, being section sixteen of school lands, township two south, of range four east, Utah Territory, which were by law reserved; that defendant had been in possession of the same since November, 1874, and improved the same, and was so in possession when said scrip was located.

Second.

The defendant specifies and urges the following errors in law, occurring at the trial and excepted to by defendant:

First. The court erred in its ruling to allow the plaintiff to introduce the patent to the lands claimed, being in the northeast quarter of the southeast quarter of section sixteen, township two south, range four east; lands subject to sale at Salt Lake City, Utah, and being in the United States of America, to Frederick A. Nims, — the lands above described, on the grounds set forth in statement.

Second. The court erred in its ruling in allowing the deed from T. W. Ferry and Frederick A. Nims to plaintiff, on the ground that no authority was shown to be in said grantors to convey any title to said property; it was, therefore, incompetent and immaterial; that as to T. W. Ferry, no title or interest was shown to be in him.

Third. The court erred in allowing evidence to be introduced that the prior survey was made before the United States survey.

Fourth. The court erred in allowing the plaintiff to answer the question, Do you know the date of that United States survey, and what was it? It should be proven by record, and not by parol.

Fifth. The court erred in overruling the question, What was the population of Park City at that time—in 1874?

Sixth. The court erred in refusing to allow defendant to prove that the lands described in the complaint were settled upon and occupied as a town site and for the purposes of trade in 1874 and 1876, containing a population of about five hundred.

Seventh. The court erred in refusing to allow the witness to answer the question whether or not the lands in controversy and embraced within the patent, and on the northeast quarter of the southeast quarter of section sixteen, being the lands in controversy, were mineral lands, etc., and known to be so at the time.

Eighth. The court erred in refusing to allow the defendant to ask the question whether or not the defendant was interested in any mining claims or locations embraced in the premises in controversy.

Ninth. The court erred in refusing to allow the defendant to prove the value of the improvements he had placed upon the land.

BOREMAN & DENNY,
Attorneys for Defendant.

EXHIBIT "A," referred to in the foregoing statement.

THE UNITED STATES OF AMERICA:

To all [to] whom these presents shall come, Greeting:

Whereas, in pursuance of the act of Congress, April 5th, 1882, entitled "An act for the relief of Thomas B. Valentine," there has been deposited in the General Land Office special certificate of location E. 148 for forty acres, in favor of Thomas B. Valentine, with evidence that the same has been duly located upon the northeast quarter of the southeast quarter of section sixteen, township
27 two south, of range four east, in the district of lands subject to sale at Salt Lake City, Utah Territory, containing forty acres, according to the official plat of the survey of said land returned to the General Land Office by the surveyor general, the said official certificate of location having been assigned by the said Thomas B. Valentine to Frederick A. Nims, in whose favor said tract has been located:

Now, know ye that there is therefore granted by the United States unto the said Frederick A. Nims, as assignee as aforesaid, and to his heirs, the tract of land above described; to have and to hold the said tract of land, with the appurtenances thereof, unto the said Frederick A. Nims, as assignee as aforesaid, and to his heirs and assigns forever, subject to any agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs, used in connection with such water rights as may be recognized and acknowledged by the local customs, laws, and decisions of courts, and also subject to the right of the proprietor of a vein or lode to extract and remove his ore therefrom, should the same be found to penetrate or intersect the premises hereby granted, as provided by law.

In testimony whereof I, Ulysses S. Grant, President of the United States of America, have caused these letters to be — patent and the seal of the General Land Office to be hereto affixed.

Given under my hand, at the city of Washington, the twenty-sixth day of February, in the year of our Lord one thousand eight hundred and seventy-seven, and of the Independence of the United States the one hundred and first.

By the President.

[Seal of General Land Office.]

U. S. GRANT.

By D. D. CONE, *Secretary.*

S. W. CLARK,
Recorder of the General Land Office.

Recorded, volume 1, page 25.

28 The within and foregoing is the statement on motion for new trial and an appeal as amended by plaintiff and settled by the parties hereto, and is now agreed upon as the statement to be used on the motion for new trial and an appeal from any order thereon and as the statement on appeal from the judgment herein, the same having been duly filed within the time allowed by the parties for filing same.

ARTHUR BROWN,
Att'y for Pl'ff.
BOREMAN & DENNY,
Att'ys for Def't.

(Endorsed:) Title of court and cause. Statement on motion for a new trial and an appeal from judgment. Filed Jan'y 14th, 1884. O. J. Averill, clerk, by H. G. McMillan, deputy clerk.

In the Third Judicial District Court of the Territory of Utah, County of Salt Lake.

EDWARD P. FERRY *vs.* JOHN L. STREET.

Service of the statement on motion for a new trial herein admitted this 14th day of January, 1884. The foregoing statement is filed within the several extensions of time allowed by the court
29 and agreement of counsel for filing the same, and it is agreed that the statement on motion for a new trial as corrected and allowed by the court, or on agreement of counsel, shall be the statement on appeal from any order of the court thereon or any judgment herein. The said statement is accepted on this day after the filing of the same and after filing and service of notice of motion for a new trial. Service of the original as the statement on appeal from the judgment accepted in lieu of copy.

Dated this 14th day of January, 1884.

ARTHUR BROWN,
Att'y for Pl'ff.
BOREMAN & DENNY,
Atty's for Def't.

(Endorsed:) Title of court & cause. Stipulation. Filed Jan'y 14th, 1884. O. J. Averill, clerk, by H. G. McMillan, deputy clerk.

30 (*Order Overruling Motion for New Trial.*)

TUESDAY, *April* 22*nd*, *A. D.* 1884.

Court sat pursuant to adjournment, and was opened for business in due form.

Present: Hon. John A. Hunter, judge; U. S. dist. attorney, and the officers of the court.

EDWARD P. PERRY *vs.* JOHN L. STREET.

The motion of defendant for a new trial having been submitted to the court, and the court having now fully considered the grounds of said motion and being of the opinion that the judgment is sustained by the law and the evidence and ought to stand, it is ordered and adjudged that said motion for a new trial be, and the same is hereby, overruled; to which ruling and order defendant, by his attorney, duly excepted.

31 (*Notice of Appeal.*)

In the District Court of the Third Judicial District of the Territory of Utah, County of Salt Lake.

E. P. FERRY, Pl'ff, *vs.* JOHN L. STREET, Def't.

You will please take notice that the defendant in the above-entitled action hereby appeals to the supreme court of the Territory of Utah from the judgment therein made and entered in the said district court of the 3rd judicial district of the Territory of Utah on the 24th day of November, 1883, in favor of the said plaintiff in said action and against the defendant and from the whole thereof. This appeal is taken on both questions of law and fact.

Dated May 9, 1884.

BOREMAN & DENNY,
Att'ys for Def't.

To the clerk of said district court of the 3rd judicial district of Utah Territory and to Arthur Brown & D. C. McLaughlin, att'ys for pl'ff.

(Endorsed:) Title of court and cause. Notice of appeal. Filed May 9th, 1884. O. J. Averill, clerk, by H. G. McMillan, deputy clerk.

32 Service accepted and acknowledged May 9, 1884.

ARTHUR BROWN,
Att'y for Pl'ff.

(*Notice of Appeal.*)

In the District Court of the Third Judicial District of the Territory of Utah, County of Salt Lake.

E. P. FERRY, Pl'ff, *vs.* JOHN L. STREET, Def't.

You will please take notice that the defendant in the above-entitled action hereby appeals to the supreme court of the Territory of Utah from the order therein made and entered in the said district court of

the 3rd judicial district of the Territory of Utah, on the 22nd day of April, 1884, in favor of the plaintiff in said action and against the defendant, said order being the order overruling the motion of the defendant for a new trial and from the whole of said order. This appeal is taken on both questions of law and of fact.

Dated May 9th, 1884.

BOREMAN & DENNY,
Att'ys for Def't.

To the clerk of the said district court of the 3rd judicial district of Utah Territory, and to D. C. McLaughlin & Arthur Brown, att'ys for plaintiff.

33 (Endorsed:) Title of court and cause. Notice of appeal. Filed May 9th, 1884. O. J. Averill, clerk, by H. G. McMillan, deputy clerk.

Service accepted and acknowledged May 9th, 1884.

ARTHUR BROWN,
Att'y for Pl'ff.

34 *Order Fixing Amount of Bond.*

In the 3rd Judicial District Court.

E. P. FERRY *vs.* JOHN L. STREET.

It is hereby ordered that the bond on stay of execution in the above case be fixed at five hundred dollars on stay for writ of possession in addition to the bond for damages.

Dated May 7th, 1884.

JOHN A. HUNTER, *Judge.*

(Endorsed:) Filed May 7th, 1884. O. J. Averill, clerk, by H. G. McMillan, deputy clerk.

35 *Undertaking on Appeal.*

In the District Court of the Third Judicial District of the Territory of Utah, in and for the County of Salt Lake.

E. P. FERRY, Plaintiff, *vs.* JOHN L. STREET, Defendant.

Whereas the defendant in the above-entitled action has appealed to the supreme court of the Territory of Utah from a judgment made and entered against him in said action on the 24th day of November, 1883, for five hundred dollars damages and — dollars, costs of suit, and also from the order overruling the new trial of defendant:

Now, therefore, in consideration of the premises and of such appeal, we, the undersigned, Frederick W. Hoyt and Arnold Wall, of the county of Summit, do hereby, jointly and severally, undertake and promise, on the part of the appellant, that the said appellant will pay all damages and costs which may be awarded against him on the appeal or on a dismissal thereof, to which amount we acknowledge ourselves, jointly and severally, bo-nd.

And whereas the appellant is desirous of staying the execution of the said judgment so appealed from, we do further, in consideration thereof and of the premises, jointly and severally, undertake and promise and do acknowledge ourselves further, jointly and severally, bound in the further sum of one thousand dollars, being double the amount named in the said judgment, that if the said judgment appealed from, or any part thereof, be affirmed, or the appeal be dismissed, the appellant will pay the sum of one thousand dollars, the amount directed to be paid by the judgment or order, or the part of such amount as to which the same shall be affirmed, if affirmed only in part, and all damages and costs which may be awarded against the appellant upon the appeal.

Dated this twelfth day of May, 1884.

FBED'K W. HOYT. [SEAL.]
ARNOLD WALL. [SEAL.]

TERRITORY OF UTAH, } ss:
County of Summit, }

Fred. W. Hoyt and Arnold Wall—1st, occupation, miner; 2nd, livery stable—the persons named in and who subscribed the foregoing undertaking as the sureties thereto, being severally duly sworn, each for himself says that he is worth the amounts specified in said undertaking as the penalty thereof over and above all his just debts and liabilities, exclusive of property exempt from execution, and that he is a resident and freeholder within the Territory of Utah.

FRED'K W. HOYT.
ARNOLD WALL.

Subscribed and sworn to before me this twelfth day of May, A. D. 1884.

[SEAL OF NOTARY.] ROBERT A. WADDILL,
Notary Public.

(Endorsed:) Title of court and cause. Undertaking on appeal. Filed May 13th, 1884, O. J. Averill, clerk, by H. G. McMillan, deputy clerk. Boreman & Denny, attorneys for appellant.

Undertaking on Appeal Concerning Real Property.

In the District Court of the Third Judicial District of the Territory of Utah, in and for the County of Salt Lake.

E. P. FERRY, Plaintiff, *vs.* JOHN L. STREET, Defendant.

Whereas the defendant *the* in this the above-entitled action has appealed to the supreme court of the Territory of Utah from a judgment made and entered against him in the said action in the said district court in favor of the plaintiff in the said action on the 24th day of November, A. D. 1883, for the recovery of the possession of certain lands and premises therein described, and five hundred dollars damages for the detention thereof and — dollars, costs of suit:

Now, therefore, in consideration of the premises and of such ap-

peal, we, the undersigned, of *the* Park City, county of Summit, and Territory of Utah—by occupation, 1st, miner; 2nd, boarding-house and shoemaker—do hereby jointly and severally undertake and promise, on the part of the appellant, that the said appellant will pay all damages and costs which may be awarded against him on the appeal or on a dismissal thereof, to which amount we acknowledge ourselves jointly and severally bound;

And whereas the appellant is desirous of staying the execution of the said judgment so appealed from, in so far as relates to the delivery of possession of the said land and premises, we do further, in consideration thereof and of the premises, jointly and severally undertake and promise, and do acknowledge ourselves further jointly and severally bound, in the further sum of five hundred dol-
39 lars (being the amount for that purpose fixed by the judge of this court), that during the possession of such property by the appellant that he will not commit, or suffer to be committed, any waste thereon, and that if the said judgment appealed from be affirmed, or the appeal dismissed, he will pay the value of the use and occupation of the property from the time of the appeal until the delivery of possession thereof, not exceeding the said sum of five hundred dollars so as aforesaid fixed by the judge of this court, by which the said judgment was rendered.

Dated this 12th day of May, A. D. 1884.

JOHN C. HOYT.
WILLIAM MARIHIGH. [SEAL.]
JAMES McCARROLL. [SEAL.]

TERRITORY OF UTAH, } ss:
County of Summit, }

John C. Hoyt, William Marihigh, and James McCarroll, the persons named in and who subscribed the foregoing undertaking as the sureties thereto, being severally duly sworn, each for himself says that he is worth the amounts specified in said undertaking as the penalty thereof over and above all his just debts and liabilities, exclusive of property exempt from execution, and that he is a resident and free householder within the Territory of Utah.

JOHN C. HOYT.
WILLIAM MARIHIGH.
JAMES McCARROLL.

40 Subscribed and sworn to before me this 12th day of May, A. D. 1884.

[NOTARIAL SEAL.] ROBERT A. WADDILL,
Notary Public.

(Endorsed:) Title of court and cause. Undertaking on appeal concerning real property. Filed May 13th, 1884. O. J. Averill, clerk, by H. G. McMillan, deputy clerk. Boreman & Denny, att'ys for defendant.

Undertaking on Appeal.

In the District Court of the Third Judicial District of Utah Territory, County of Salt Lake.

E. P. FERRY, Plaintiff, *vs.* JOHN L. STREET, Def't.

Whereas John L. Street, the defendant in the above-entitled action, has appealed to the supreme court of the Territory of Utah from an order made and entered against him in said action in the said district court in favor of the pl'ff in said action on the
41 22nd day of April, A. D. 1884, overruling the motion of defendant for a new trial therein :

Now, therefore, in consideration of the premises and of such appeal, we, the undersigned, C. E. Street & A. E. Street, of the county of Summit, Utah Territory, by occupation a miner, and the undersigned, —— ——, of the county of Summit, Utah Territory, by occupation a ——, do hereby jointly and severally undertake and promise on the part of the appellant that the said appellant will pay all damages and costs which may be awarded against him on the appeal, to payment of which we jointly and severally acknowledge ourselves bound.

Dated this 12th day of May, A. D. 1884.

CHARLES E. STREET. [SEAL.]
A. E. STREET. [SEAL.]

TERRITORY OF UTAH, }
County of Salt Lake, } *ss:*

Charles E. Street and A. E. Street, the persons named in and who subscribed the foregoing undertaking as the sureties thereto, being severally duly sworn, each for himself says that he is worth the amount specified in said undertaking over and above all just debts and liabilities, exclusive of property exempt from taxation, and that he is a resident [free]holder within the Territory of Utah.

CHARLES E. STREET.
A. E. STREET.

42 Subscribed and sworn to before me this 12th day of May, 1884.

[NOTARIAL SEAL.] ROBERT A. WADDILL,
Notary Public.

(Endorsed :) Title of court and cause. Undertaking on appeal. Filed May 13th, 1884. O. J. Averill, clerk, by H. G. McMillan, deputy clerk.

Title [of] Case.

Order extending time to file transcript in Supreme Court ten days from June 7th.

(Signed) JOHN A. HUNTER,
Chief Justice.

Endorsed : Filed June 7th, 1884.

43 *Stipulation.*

TERRITORY OF UTAH, } ss:
County of Salt Lake, }

In the District Court of the 3rd Judicial District of the Territory of Utah, County of Salt Lake.

EDWARD P. FERY, Plaintiff, *vs.* JOHN L. STREET, Defendant.

It is hereby stipulated that the foregoing (42) pages, beginning with the copy of the complaint, contain a full, true, and correct transcript of the judgment-roll, record, and papers to be used on appeal herein from the judgment, and on appeal from the order overruling motion of defendant for new trial, and that the complaint, answer, findings, judgment, notice of motion for new trial, motion for new trial, order overruliug motion for new trial, statement on motion for new trial and appeal, patent, notices of appeals, order fixing amount of bond, and undertakings on appeals are correctly set forth in the foregoing transcript, and can be used on appeal from the judgment and on appeal from the order overruling motion for new trial.

Dated June —, 1884.

BOREMAN & DENNY,
Att'ys for Appellant.
ARTHUR BROWN,
Att'y for Respondent.

44 [Endorsed:] Edward P. Ferry, pl'ff & resp't, *vs.* John L. Street, def't & appellant. Transcript. Filed June 14th, 1884. E. T. Sprague, clerk. Boreman & Denny, att'ys for appellant.

45 TUESDAY, *January* 13*th*, *A. D.* 1885.

* * * * * * *

EDWARD P. FERRY, Respondent, *vs.* JOHN L. STREET, Appellant.

From 3d district.

This cause coming on regularly for hearing was argued by Mr. Denny for appellant, by Messrs. J. G. Sutherland and Arthur Brown for respondent, submitted, and taken under advisement.

WEDNESDAY, *January* 14*th*, *A. D.* 1885.

A session of the supreme court of Utah Territory was held this day, beginning at 10 o'clock a. m., pursuant to adjournment.

Present and presiding: The Hon. Chas. S. Zane, chief justice.

Present also: the Hon. Philip H. Emerson, associate justice, and the Hon. Stephen P. Twiss, associate justice; the clerk, marshal, and members of the bar.

Court was duly opened.

* * * * * * *

EDWARD P. FERRY, Respondent, *vs.* JOHN L. STREET, Appellant.

From 3d district.

This cause having been heretofore argued and submitted, and the court being sufficiently advised thereon, it is now here considered, ordered, and adjudged that the judgment of the district court therein be, and the same is hereby, affirmed, and that re-
46 spondent have and recover of and from appellant thirteen dollars costs.

TUESDAY, *January 20th, A. D.* 1885.

* * * * * * *

EDWARD P. FERRY, Respondent, *vs.* JOHN L. STREET, Appellant.

From 3d district.

On motion of counsel of appellant, ordered that time for filing petition for rehearing of this cause be and is extended until ten days shall have elapsed after the filing of the opinion herein, and remittitur is meantime stayed.

47 In the Supreme Court of Utah Territory.

EDWARD P. FERRY, Respondent, *vs.* JOHN L. STREET, Appellant.

The form of this action is one for the possession of real estate situated in the town of Park City. The plaintiff claims title under the patent of the United States and by mesne conveyances to the plaintiff from the patentee. No question is made as to the existence of the patent or the title deraigned therefrom in plaintiff, but in this action at law for the recovery of possession the defendant seeks to assail that patent on the following grounds:

First. The premises, in truth, did describe a part of section 16, and that therefore they were not open to settlement, and the plaintiff and his grantor had no right to patent the same, for the reason that it was a school section, and the authorities were forbidden to
48 patent the same to settlers.

Second. That the said lands were mineral lands, and therefore not open to claims of settlers.

Third. That the lands were occupied by people squatted thereon and claiming — to be a city, to wit, Park City.

We will determine these three objections in their order. The plaintiff procures his title under the scrip known as Valentine scrip, the authority for the issuing of which is to be found under the General Laws of the United States of 1881, page —, which authorises the holders of such scrip to enter unappropriated lands of the United States, and the first question involves the inquiry as to what is the meaning of appropriate or unappropriate. It is complained by the appellant that lands which may possibly fall in section 16 or 36, although not then surveyed, are appropriated.

On the other hand it is contended that the only appropriation of the lands which fall within section 36 and 16 is when they are surveyed and found to be such sections by official survey;

and until such survey the lands are open for any appropriator, and a person seeking to pre-empt or to homestead on such lands has always to be recognized as one entitled to enter thereon, and his right has to be protected, although afterward the number of the section turned out to be 16 or 86. The Valentine scrip was not more limited; the holder of it had the right to enter upon any lands which had not been actually designated and set aside for the use of schools or for the use of actual appropriators. These pre-emptors or people were not holding under homestead claim. These lands had never been pre-empted or made subject to homestead claims, nor had they been surveyed at the time when this patent was applied for. If under any assumed state of circumstances a patent can be valid then it cannot be attacked in any collateral proceeding or in any manner, except by direct action, to set aside the deed indicated, either by the United States or the persons who have succeeded to its right. It is apparent that this patent not only could have been, but, under the existing circumstances was, valid. It was not in the power of the defendant or appellant to attack that patent in a court of law on the ground that it included school lands.

The law upon the subject is fully stated in the case of Steel *vs.* Smelting Co., 106 United States, page 454: "So with a patent for land of the United States, which is the result of the judgement upon the right of the patentee by that department of the Government to which the alienation of the public lands is confided. The remedy of the aggrieved party must be sought by him in a court of equity if he possesses such an equitable right to the premises as would give him the title if the patent were out of the way. If he occupy with respect to the land no such position as this, he can only apply to the officers of the Government to take measures in its name to vacate the patent or limit its operation. It cannot be vacated or limited in proceedings where it comes collaterally in question. It cannot be vacated or limited by the officers themselves. Their power over the land is ended when the patent is issued and placed on the records of the Department."

The other cases cited on both sides are in conformity with this ruling.

The determination of this first question decides the other also. If these premises were mineral lands, as claimed by the appellant, and the appellant had any right therein, it was his duty to have applied for a patent and assert- his right before the Department. An adjudication of the Department of the Land Office upon the subject is conclusive and final. It would be a strange doctrine if, after the United States Government has patented lands away and mineral should be discovered in the lands within his patent or deed, that some outside discoverer could say the patent was void. Such was not the intention of the law. If it had been true that any mineral entries had been made at the Land Office at the time this patent was applied for, then such owners, and the defendant among them, if he were one, must have had notice of the proceedure, and the law assumes and presumes he did have notice. If, after inquiry,

52 the Land Office determined the plaintiff had, or his grantors had, a right to a patent, that decision was binding upon the court. The same result must follow if no inquiry was entered into. The Land Office had jurisdiction in the matter; its determination was final. Precisely the same views control the third point. The defendant offers to prove that there were, at the time of the application of this Valentine script to the premises in question, a few hundred squatters within the land conveyed. Those squatters had taken no measures or steps to procure title under the town-site law, filed no papers in any tribunal entitling them to act as such. If it was desired and within the law to plat a town-site entry they had ample opportunity. Until they did so they were mere trespassers and the lands were unappropriated, and it was open for the Government to eject them.

Yosemite Case, 15 Wallace, 77.

Until such act, on the part of squatters, any person having the authority of the United States Government could deed the same.

The grantor of the plaintiff holding the Valentine script had
53 the authority of the United States Government. These lands at the time had been unappropriated in every sense of the term. They had not been even surveyed, and until they were surveyed no appropriation whatsoever had been made of them. The court concurs in the findings and the opinion of the court below.

P. H. EMERSON,
Asso. Justice.

The other judges concur.

Eudorsed: In the supreme court. Edward P. Ferry *vs.* John L. Street. Opinion. Filed Aug. 4th, 1885. E. T. Sprague, clerk.

Recorded on pages 221.

54 Regular January term.

MONDAY, *January* 11*th*, *A. D.* 1886.

* * * * * * *

EDWARD P. FERRY, Respondent,
vs.
JOHN L. STREET, Appellant.

From 3d dist.

A petition for the rehearing of this cause was submitted and by the court taken under advisement.

THURSDAY, *January* 14*th*, *A. D.* 1886.

* * * * * * *

EDWARD P. FERRY, Respondent,
vs.
JOHN L. STREET, Appellant.

From 3d dist.

A petition for the rehearing of this cause having been heretofore submitted and the court having duly considered the same, it is now

here ordered that such rehearing be, and it is hereby, granted and allowed.

Territory of Utah, Supreme Court.

EDWARD P. FERRY, Respondent,

vs.

JOHN L. STREET, Appellant.

POWERS, *J.*:

The appellant petitions for a rehearing. The case was heard
55 by this court before two of its present members were upon the bench. The opinion was not filed until some months after all but one of the present members of the court had retired from the bench. The questions involved are of importance, and we are pursuaded that a case is made by the petition which will justify us in ordering a rehearing. The case, as now presented, is quite similar to the case of Burrows *vs.* Guest, decided at the June term, 1885, in which a rehearing was granted.

We feel that we must not overlook the fact that the tone and language of the petition filed in this case is reprehensible. Imputations are cast upon the predecessors of the present members of the court which we cannot allow to pass unrebuked. We have had occasion heretofore to discuss among ourselves papers which were not couched in language proper to be addressed to a court of last resort, and we have determined that we cannot longer permit counsel to file papers disrespectful to the court, or to former members thereof, or which, overstepping proper bounds, attacks reputable mem-
56 bers of the bar. If we did not feel that a party should not suffer from the indiscretion of his counsel we should refuse a rehearing upon the petition filed, but, looking simply to the merits of the matter and not to the manner in which it is presented, we order a rehearing.

Lowe, C. J., concurs.

Boreman, J., having been counsel in the case, did not sit.

Endorsed: Territory of Utah, supreme court. Edward P. Ferry, respondent, *vs.* John L. Street, appellant. Opinion on motion for rehearing. Filed January 15th, 1886. E. T. Sprague, clerk.

57 MONDAY, *January* 25, *A. D.* 1886.

* * * * * * *

EDWARD P. FERRY, Respondent, *vs.* JOHN L. STREET, Appellant.

From 3d dist.

This cause, coming on for rehearing on leave heretofore granted, was argued by W. C. Hall and Pressly Denny for appellant, Arthur Brown for respondent, submitted, and taken under advisement, Boreman, justice, having been of counsel, not sitting therein.

THURSDAY, *July* 22*d*, *A. D.* 1886.

A session of the supreme court of Utah Territory was held this day, beginning at 2 o'clock p. m., pursuant to adjournment.

Present and presiding: The Hon. C. S. Zane, chief justice, and present also the Hon. O. W. Powers, associate justice; the clerk, marshal, and members of the bar.

Court was duly opened.

* * * * * * *

EDWARD P. FERRY, Respondent, *vs.* JOHN L. STREET, Appellant.

From 3d dist.

This cause having been heretofore argued and submitted a
58 second time on leave in that behalf granted, the court being sufficiently advised thereon, it is now here considered, ordered, and adjudged (Boreman, J., having been of counsel, taking no part herein) that the judgment of the district court therein be, and it is hereby, affirmed, and that respondent have and recover of and from appellant costs.

Thereupon said appellant, by P. Denny, his counsel, prayed the allowance of an appeal from this judgment to the Supreme Court of the United States, and asked that the amount of a supersedeas bond te be given thereon be now fixed. Upon consideration thereof it is ordered that said appeal be, and hereby is, allowed, and the amount of a supersedeas bond to be given thereon be, and is hereby, fixed at two thousand ($2,000) dollars.

59 In the Supreme Court, Utah Territory.

EDWARD P. FERRY, Respondent, *vs.* JOHN L. STREET, Appellant.

ZANE, *C. J.:*

This case is now submitted on a rehearing.

It is an action at law commenced in the first district court for the possession of two town lots in Park City, Summit county, Utah. The defendant answered, admitting possession and alleging that the land of which the lots in dispute were a part was, at the time of its location, under the laws of the United States, occupied for the purposes of commerce and trade and was also mineral land.

On the trial of the cause the court below received in evidence a patent from the United States to one Frederick A. Nims, the patentee, and a deed from him to the plaintiff.

To their admission in evidence the defendant objected and excepted.

The following is a copy of the patent:

"THE UNITED STATES OF AMERICA.

"To all [to] whom these presents shall come, Greeting:

"Whereas in pursuance of the act of Congress, April 5th, 1882, entitled 'An act for the relief of Thomas B. Valentine,' there has been deposited in the General Land Office special certificate of location E. 148, for forty acres, in favor of Thamas B. Valentine, with evidence that the same has been duly located upon the northeast quarter of the southeast quarter of section sixteen, township two south,

of range four east, in the district of lands subject to sale at Salt Lake City, Utah Territory, containing forty acres, according to the official plat of the survey of said land returned to the General Land Office by the surveyor general, the said official certificate of location having been assigned by the said Thomas B. Valentine to Fred-
60 rick A. Nims, in whose favor said tract has been located:

"Now, know ye that there is therefore granted by the United States unto the said Frederick A. Nims, as assignee as aforesaid, and to his heirs, the tract of land above described; to have and to hold the said tract of land, with the appurtenances thereof, unto the said Fredrick A. Nims, as assignee as aforesaid, and to his heirs and assigns forever, subject to any agricultural, manufacturing, or other purposes and rights to ditches and reservoirs used in connection with such water rights as may be recognized and acknowledged by the local customs, laws, and decisions of courts, and also subject to the right of the proprietor of a vein or lode to extract and remove his ore therefrom should the same be found to penetrate or intersect the premises hereby granted, as provided by law.

"In testimony whereof I, Ulysses S. Grant, President of the United States of America, have caused these letters to be — patent and the seal of the General Land Office to be hereto affixed.

"Given under my hand, at the city of Washington, the twenty-sixth day of February, in the year of our Lord one thousand eight hundred and seventy-seven, and of the Independence of the United States the one hundred and first.

"By the President:

"U. S. GRANT,
"By D. D. CONE, *Secretary.*

"[Seal of General Land Office.]

"S. W. CLARKE,
"*Recorder of the General Land Office.*"

This patent was located under an act of Congress entitled "An act for the relief of Thomas B. Valentine," approved April 5th, 1872. It provided for the issuance of scrip to Valentine by the Commissioner of the General Land Office and the location thereof by
61 Valentine or his legal representatives on any "unoccupied and unappropriated lands of the United States not mineral," etc., and the issuance of a patent therefor.

It appears from the record that on October 12th, 1875, one Brooks, a civil engineer and deputy United States mineral surveyor, made a private survey of the land described in the patent for Nims, the patentee; that on the same day Nims located the land by filing Valentine scrip with the regester of the land office at Salt Lake City and by leaving the same as payment therefor; that the land was not surveyed by the United States until August 25th, 1876; that the land north had been surveyed by the Government and that therefrom the northeast and northwest corners of section sixteen could be ascertained. Section 15 of "An act to establish a territorial government for Utah" provides "that when the lands in said Territory shall be surveyed under the direction of the Government of the United

States, preparatory to bringing the same into market, sections 16 and 36 in each township in said Territory shall be, and the same are hereby, reserved for the purpose of being applied to schools," etc.

Compiled Laws of Utah, 1876, page 34, and section 1946, Revised Statutes United States, provide that sections 16 and 36 in each township of Utah and other Territories mentioned shall be reserved for the purpose of being applied to schools, etc.

Notwithstanding section 16, of which the land in dispute was a part, had not been surveyed at the time of the location relied upon in this case, did the above provisions of law vest the title to section 16 in the Territory, did they operate as an absolute reservation of the section for school purposes, or did the legal right and title of sections 16 and 36 remain in the United States till they should be surveyed—bounded—until brought into existence as sections?

62 Until a survey there could be no townships or sections 16 and 36.

If the title and legal right to dispose of the land found by survey to constitute those sections continued in the Federal Government until surveyed, then the patent must be held valid in an action of ejectment.

Section 15, above quoted, declares that the sections mentioned "shall be, and the same are hereby, reserved when the lands in said Territory shall be surveyed under the direction of the Government," etc.

This language indicates an intention to reserve when the lands shall be surveyed. It does not indicate a grant operating at once and before the survey. The purpose of the reservation is expressed in the section—"for the purpose of being appplied to schools in said Territories and in the States to be erected out of the same." No grant *in præsenti* is expressed. The lands are reserved for the purpose mentioned. The right and title remain in the Government.

Section 2275, Revised Statutes U. S., shows clearly that the understanding of Congress was that the title should not vest in the Territory or State before the survey.

It is: "Where settlements with a view to pre-emption have been made before the survey of the lands in the field which are found to have been made on sections 16 or 36 those sections shall be subject to the pre-emption claim of such settler, and if they or either of them have been or shall be reserved or pledged for the use of schools or colleges in the State or Territory in which the land lies, other lands of like quantity are appropriated in lieu of such as may be patented by pre-emptors, and other lands are also appropriated to compensate deficiencies for school purposes where sections 16 or 36 are fractional in quantity or where one or both are wanting, by reason of the township being fractional or

63 for any natural cause whatever."

When a person settles on the public lands with a view to pre-emption this section gives him a right to the patent, notwithstanding the land turns out when surveyed to be section 16, or 36, or a part thereof. The title, and the right to dispose thereof, is regarded as in the United States till the survey; if not, why transfer

it by patent to the pre-emptor? Those sections, or their equivalent in other lands, are regarded as pledged for school purposes. The language of the law is "reserved or pledged." The term reserved is regarded as synonomous in meaning with pledged. Nims having made his location before the land was surveyed, the title was in the United States at that time, and his title under the patent relates to the time of the location.

The case of Hydenfeldt *vs.* Daney Gold and Silver Mining Co., 93 U. S. R., 634, has been cited.

In that case the plaintiff claimed under a patent from the State of Nevada, and the defendant under a patent from the United States. The plaintiff assumed that sections 16 and 36, whether surveyed or unsurveyed, were granted to Nevada for the support of schools. The language of the act of Congress was: "That sections numbered 16 and 36 in every township shall be and are hereby granted to said State for the support of common schools."

The court said: "The defendant and those under whom it claims occupied the land prior to the survey, and were entitled to purchase. The patent subsequently obtained from the United States relates back to the time of the original location and entry, and perfects their right to the exclusion of all adverse intervening claims," and held that until the status of the land was fixed by a survey, and they were capable of identification, Congress reserved absolute power over them.

The defendant relied upon the case of Cooper *vs.* Roberts, 18 How., 173. The land in dispute was a portion of section 16, which plaintiff affirmed had been appropriated by the United
64 States to the State of Michigan for the use of schools, and his claim depended on the validity of a patent from that State issued in November, 1851. The defendant's right depended on a patent from the United States issued in 1852. The land was surveyed in 1847. The act of Congress admitting the State of Michigan to the Union contained the following provision: "That every section No. 16 in every township of the public lands, and when such section has been sold, or otherwise disposed of, other lands equivalent thereto, and as contiguous as may be, shall be granted to the State for the use of schools."

The court said: "We agree that until the survey of the township and the designation of the specific section the right of the State vests in compact — binding, it is true, the public faith, and dependent for execution upon the political authorities. Courts of justice have no authority to mark out and define the land which shall be subject to the grant. But when the political authorities have performed this duty the compact has an object upon which it can attach, and if there is no legal impediment the title of the State becomes a legal title. The *jus ad rem* by the performance of that executive act becomes a *jus in re*, judicial in its nature, and under the cognizance and protection of the judicial authorities, as well as the others."

The court held in effect that until the survey a simple obligation rested on the Federal Government, and when the survey was made the State acquired a right to the particular land; the *jus ad rem*

then became a *jus in re*; that until the survey the right of the State vested in compact, and at that time it vested in the State.

The case of Rinall *vs.* St. Louis public schools, relied upon by appellant, was a contention about certain town or village lots reserved by an act of Congress passed in 1812 for the support of schools.

On the 27th of January, 1831, another act of Congress was
65 passed for the purpose of transferring the title of the United States (if any) remaining in the lots to the several towns and villages embraced by the act of 1812. The court held that the act of 1831 vested the title to the lands in dispute in the city of St. Louis. These lots had been so surveyed and known that they could be identified. Duncan, through whom the appellant claimed, did not enter the land till 1836, and the United States having parted with its title in 1831, such entry was void.

Bissell *vs.* St. Louis Public Schools, 9 Howard, 19.

By the 12th section of an act of Congress passed March 3rd, 1803, entitled An act regulating the grants of land and providing for the disposal of the lands of the United States south of the State of Tennessee, the 16th section in each township was reserved and appropriated to the support of schools.

Referring to the provision the court said: "The State of Mississippi acquired a right to every 16th section by virtue of these acts on the extinguishment of the Indian right of occupation, the title to which in respect to the particular section became vested (if vested at all) as soon as the surveys were made and the sections designated. No patent was necessary or is ever issued for these school sections."

Gains *vs.* Nicholson, 9 Howard, 361.

On the trial of this case in the court below the defendant offered to prove that the land in dispute was in Park City, and its population at the time of the location --, and that the land was then occupied as a townsite, and that the same was mineral land.

To this evidence an objection was interposed by the plaintiff, which was sustained by the court. This ruling of the court the respondent assigned as error.

Was it competent for the defendant to prove as a defense that the land was mineral or that it was occupied as a town-site?

Was the patent conclusive of such facts in an action of
66 ejectment?

The act of Congress authorized the location of Valentine scrip on any of the public lands unoccupied and unappropriated and not mineral, whether surveyed or unsurveyed. Whether the land belonged to that class termed mineral land or was occupied as a town-site were questions of fact to be determined by the Land Department before issuing the patent. Such determination could only be made upon evidence. The officers of the Land Department constitute a tribunal to determine such issues of fact, and, when decided, the decision is conclusive in an action at law. The lands in

dispute were the public property of the United States at the time of the location upon which the patent in question was issued. They had not been reserved from sale, they were in no reservation made by law, and the law under which the location was made authorized the same.

The act authorizing the location of Valentine scrip did not limit the right to public land of the description mentioned outside of town-sites. But if it were conceded that other statutes did make the limitation, then the question as to whether the land or any portion of it was a town-site—whether it was settled upon and occupied as such—was a question of fact. This question, as well as the mineral qualities and character of the land, was for the Land Department to determine upon evidence.

This is not the case of a city with boundaries fixed by law and recognized as such. The purpose of the evidence was to show that the land in dispute was occupied by a portion of the residents of Park City; that houses were situated upon it in which people were living, and that the same were in such proximity as to constitute a portion of the town.

The mineral characteristics of the land the defendant proposed to show by persons familiar with mineral lands, and that there were such prospects upon it.

67 In the case of the Smelting Co. *vs.* Kemp the court said, speaking of the effect of the action of the officers of the Land Department of the United States: "In the course of their duty, the officers of that Department are constantly called upon to hear the testimony as to matters presented for their consideration and to pass upon its competency, credibility, and weight. In that respect they exercise a judicial function, and therefore it has been held in various instances by this court that their judgment as to matters of fact properly determinable by them is conclusive when brought to notice in a collateral proceeding. Their judgment in such cases is like that of other special tribunals upon matters within their exclusive jurisdiction — unassailable except by a direct proceeding for its correction or annulment."

Further, along in the same opinion, the court said, speaking of the presumptions attending the issuance of a patent:

"If in issuing a patent its officers took mistaken views of the law, or drew erroneous conclusions from the evidence, or acted from imperfect views of their duty, or even from corrupt motives, a court of law can afford no remedy to a party alleging that he is thereby aggrieved. He must resort to a court of equity for relief, and even there his complaint cannot be heard unless he connect himself with the original source of title, so as to be able to aver that his rights are injuriously affected by the existence of the patent; and he must possess such equities as will control the legal title in the patentee's hands."

Smelting Co. *vs.* Kemp, 104 U. S., 636.

In the case of Steel *vs.* Smelting Co., 106 U. S. S. C., 447, referring to the Land Department of the United States, the court said: "That Department, as we have repeatedly said, was established to

supervise the various proceedings whereby a conveyance of the title from the United States to portions of the public domain is obtained, and to see that the requirements of different acts of Congress
68 are fully complied with. Necessarily, therefore, it must consider and pass upon the qualifications of the applicant, the acts he has performed to secure the title, the nature of the land, and whether it is of the class which is open to sale. Its judgment upon these matters is that of a special tribunal, and is unassailable except by direct proceedings for its annulment or limitation. Such has been the uniform language of this court in repeated decisions."

The respondent cited the case of Horton *vs.* Nebraska, 21 Wall., 660.

In that case the plaintiff claimed from the United States title to 320 acres of salt lands situated in Nebraska, under locations of military county land warrants upon which patents had been issued.

The State based its title on an alleged grant from the United States by virtue of certain statutes reserving salt springs and salines for the use of the State.

In its opinion the court attached importance to the fact that the lands had been surveyed before location, and the salines noted in the field books, though the notations were not transferred to the register's general plats, and also to the fact that their saline character was palpable to the eye" (the court remarked that); "they resembled snow-covered lakes."

The notes on the field books and the salines on their surface indicated their boundaries; they could be thereby identified. If so, the title passed to Nebraska before the plaintiff's location, and therefore the patents must have been void.

The United States *vs.* Carpenter was a suit in equity to vacate a patent of the United States issued to one August Chienson to a quarter-section of land a part of the Red Pipestone quarry in the county of Pipestone, in the State of Missouri.

The court held that by treaty between the United States and the Yankton tribe of Sioux or Decotah Indians the whole of the reservation embracing the quarry was withdrawn from private
69 entry or appropriation at the time of the location, and that the entry was therefore void. This reservation was bounded and recognized.

United States *vs.* Carpenter, 111 U. S., 347.

The decisions of the Supreme Court of the United States establish the following propositions of law:

First. That the various acts of Congress mentioned reserving portions of the public lands of the United States to the Territories or States for the benefit of their people vest the title of such lands so reserved in the Territories or States when the lands are surveyed, or when they are bounded and ascertained. Until such time the obligation is executory and the title remains in the Federal Government.

Second. If the officers of the Land Department had no authority to issue the patent, for the reason that there was no law authorizing

the sale of the land, or that it had been reserved from sale (being identified), or that the title was not in the United States, the patent is void.

Third. As to all questions of fact which the Land Department is called upon to consider and pass upon before issuing the patent, the judgment of that Department is unassailable except in a direct proceeding for its annulment.

Fourth. Among the questions the Land Department is called upon to consider is the character of the land and the class to which it belongs, whether agricultural or mineral, or whether it is within a town-site.

Fifth. If the Land Department had jurisdiction the law conclusively presumes, in a collateral proceeding, the existence of all circumstances essential to the validity of the patent. Unless the patent is void in view of the law, or of circumstances which the court may take judicial notice of, it must be held valid.

All other essential circumstances must be presumed to have existed.

70 The views expressed in this opinion find support in the following cases, as well as in those above referred to.

Johnson *vs.* Towsley, 13 Wall., 72.
Polk's Lessee *vs.* Wendel, 9 Cranch, 87.
Wilcox *vs.* Jackson, 13 Peters, 498.

Upon a careful consideration of the whole case we find no error. The judgment of the court below is therefore affirmed.

Powers, A. J., concurs.

Boreman, A. J., took no part in the decision of this case.

Endorsed: Filed July 22, 1886. E. T. Sprague, clerk.

71 UNITED STATES OF AMERICA, *ss:*

To E. P. Ferry, plaintiff, Arthur Brown, and J. G. Sutherland, att'ys:

You are hereby cited and admonished to be and appear at a term of the Supreme Court of the United States to be holden at Washington, on the second Monday of October next, pursuant to an appeal allowed in a certain cause lately pending in the supreme court of Utah Territory, wherein you are plaintiff and respondent and John L. Street is defendant and appellant, to show cause, if any there be, why the judgment from which said appeal is allowed should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, this — day of ——, in the year of our Lord one thousand eight hundred and eighty-six.

Approved:

C. S. ZANE,
Chief Justice Supreme Court Utah Territory.

72 Due service of the within citation admitted this — day of July, 1886.

SUTHERLAND & McBRIDE,
ARTHUR BROWN,
Att'ys for Appellee.

[Endorsed:] Filed Aug. 9, 1886. E. T. Sprague, clerk.

73 In the Supreme Court of the Territory of Utah.

EDWARD P. FERRY *vs.* JOHN L. STREET.

Know all men by these presents that we, Arnold Wall, F. C. Thompson, F. W. Hoyt, and Thomas H. Watson are held and firmly bound and jointly indebted to E. P. Ferry in the sum of two thousand dollars, lawful money of the United States; for the payment of which, well and truly to be paid, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 30th day of July, A. D. 1886.

Whereas lately, at the June term of the supreme court for the Territory of Utah, in a cause pending in said court between Edward P. Ferry and John L. Street, wherein said Ferry is plaintiff and respondent, and said Street is defendant and appellant, judgment was rendered against said appellant affirming the judgment of the district court of third judicial district of Utah Territory, and the said appellant having since obtained the allowance of an appeal from said judgment of affirmance to the Supreme Court of the
74 United States, and a citation directed to the said Edward P. Ferry, citing and admonishing him to be and appear at said Supreme Court of the United States, at a session to be holden at Washington, D. C., on the second Monday of October, A. D. 1886:

Now, the condition of the above obligation is such that the said appellant shall prosecute the said appeal to effect and answer all damages and costs in case they fail to make the appeal good, then this obligation to be void; otherwise to remain in full force and effect.

ARNOLD WALL. [SEAL.]
F. C. THOMPSON. [SEAL.]
F. W. HOYT. [SEAL.]
THOS. H. WATSON. [SEAL.]

TERRITORY OF UTAH, } ss:
County of Summit, }

Arnold Wall, F. C. Thompson, F. W. Hoyt, and Thomas H. Watson, being duly sworn, each for himself says: I am a freeholder in said Territory of Utah and am worth the sum set opposite my name as follows, to wit:

Arnold Wall, $1,600.00; sixteen hundred dollars.
F. C. Thompson, $1,000.00, one thousand dollars.
F. W. Hoyt, $800.00, eight hundred dollars.

Thomas H. Watson, $600.00, six hundred dollars, over and
75 above all my just debts and liabilities, exclusive of property exempt from execution.

ARNOLD WALL.
F. C. THOMPSON.
F. W. HOYT.
THOS. H. WATSON.

Subscribed and sworn to before me this 30th day of July, A. D. 1886.

[SEAL.] HENRY SHIELDS,
Notary Public, Summit County, Utah Territory.

Approved:
C. S. ZANE,
Chief Justice, Utah Territory.

Endorsed: E. P. Ferry *vs.* J. L. Street. Bond on appeal. Filed Aug. 9th, 1886. E. T. Sprague, clerk.

76 In the Supreme Court of the Territory of Utah.

E. P. FERRY *vs.* JOHN L. STREET.

Know all men by these presents that we, W. H. Roy and Thomas H. Watson, of Summit county, of Utah, are held and firmly bound unto James H. McKenney, clerk of the Supreme Court of the United States, in the sum of two hundred dollars, to be paid to the said McKenney, his heirs, successors, or legal representatives; for which payment, well and truly to be made, we hereby bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the 30th day of July, 1886.

Whereas at a term of the supreme court of Utah Territory, held in June, 1886, in a certain cause therein pending in said court, in which E. P. Ferry was plaintiff and John L. Street defendant and respondent, an appeal was allowed to the Supreme Court of the United States from the judgment in said cause, which judgment was in favor of said respondent and against appellant:

Now, if said defendant and appellant shall well and truly
77 pay, or cause to be paid, to the said McKenney, and his successors in office, all such fees and costs as shall accrue to him or them on appeal so as aforesaid allowed and are charg-able to said appellant, then this obligation to be void; otherwise in full force and effect.

W. H. ROY. [SEAL.]
THOS. H. WATSON. [SEAL.]

In presence of—
J. WATSON.

TERRITORY OF UTAH, *Summit County:*

Thomas H. Watson and W. H. Roy, being duly sworn, each for himself says that he is a resident *of* and freeholder of said Summit county, Territory of Utah, and that he is worth the sum of four hun-

dred dollars (being double the amount of the bond) over and above his indebtedness & liabilities and property exempt from execution.

W. H. ROY.
THOS. H. WATSON.

Subscribed and sworn to before me this 30th day of July, A. D. 1886.

[SEAL.] HENRY SHIELDS,
Notary Public, Summit County, Utah Territory.

Approved:
C. S. ZANE,
Chief Justice Utah Territory.

Endorsed: E. P. Ferry *vs.* J. L. Street. Bond for costs. Filed Aug. 9th, 1886. E. T. Sprague, clerk.

78 In the Supreme Court of the Territory of Utah.

EDWARD P. FERRY, Pl'ff, *vs.* JOHN L. STREET, Def't.

TERRITORY OF UTAH, *County of Salt Lake:*

John L. Street, being duly sworn, says: I am the defendant in the above-entitled action; am the owner of, in possession of, and reside upon, lots 15 and 16 & lot ("B"), opposite 4th St., in block 22, and the south half of lot one, block 23, being 100 by 150 feet, described in the complaints; that affiant has placed large and valuable improvements upon said lands; that the same is near the center of Park City, containing a population of about twenty-one hundred, and a mining population in its immediate vicinity of about two thousand more; that said city is improving very rapidly; that the post office for said city is situated upon the lands in dispute; that the lands and premises in dispute in this action exceeds in value, exclusive of costs, the sum of five thousand dollars ($5,000.00.)

J. L. STREET.

Subscribed and sworn to before me this 23d day of July, 1886.

[SEAL.] H. G. McMILLAN,
Deputy Clerk, 3d Dist. Court, Utah Territory.

79 TERRITORY OF UTAH, *County of Summit:*

F. W. Hoyt, Thomas H. Watson, W. H. Roy, and Henry Shields, being duly sworn, say, each for themselves, that they are acquainted with the property in dispute in the case of E. P. Ferry *vs.* John L. Street, situated in Park City, Utah, being lots 15 and 16 & lot ("B") in block 22, and the south half of lot 1, block 23, being 100 feet front by 150 ft. deep. They have read the affidavit of John L. Street herein concerning the same; that the same is true, and the said property in dispute in this case exceeds the value of five thousand dollars ($5,000.00); that they are over 21 years of age.

F. W. HOYT.
THOS. H. WATSON.
W. H. ROY.
HENRY SHIELDS.

Subscribed and sworn to before me this 30th day of July, 1886.
FRANK E. JAMES,
Notary Public for Summit County, Utah.

I am acquainted with the above-named affiants, and consider them reliable and responsible.
FRANK E. JAMES,
Notary Public.

Endorsed: In the supreme court of the Territory of Utah. Edward P. Ferry *vs.* John L. Street. Affidavit of value of property. Filed August 9, 1886. E. T. Sprague, clerk.

80 In the Supreme Court of the Territory of Utah.

EDW. P. FERRY, Plaintiff, *vs.* JOHN L. STREET, Defendant.

TERRITORY OF UTAH, } ss:
County of Summit, }

John H. Rogers, being duly sworn, deposes and says that he is a resident of Park City, and has so resided there for a period of six years; that he is over 21 years of age, and that he is a general merchant in said Park City; that he is well acquainted with the value of property in Park City and with the property in dispute in the case of Edw. P. Ferry *vs.* John L. Street, being lots 15 and 16 and lot B in block 22, and the south half of lot 1, block 23, being 100 by 150 feet; that he has read the affidavit of Edw. P. Ferry herein concerning the same; [that the same] is true and the value of said described property therein will not exceed three thousand dollars. And further deponent saith not.
J. H. ROGERS.

Subscribed and sworn to before me this 22d day of Sept., 1886.
[SEAL.] JAMES MOFFAT,
Notary Public, Summit Co., Utah.

Endorsed: John H. Rogers. Filed Sept. 27, 1886. E. T. Sprague, clerk.

81 In the Supreme Court of the Territory of Utah.

EDWARD P. FERRY, Plaintiff, *vs.* JOHN L. STREET, Defendant.

TERRITORY OF UTAH, } ss:
County of Summit, }

A. B. Emery, being duly sworn, deposes and says that he is over 21 years of age, and has resided for the last six years in Park City and does now reside in Park City; that he is the Union Pacific Express Co.'s agent at said Park and book-keeper of the Daly Mining Co.; that he is well acquainted with the value of property in Park City and with the property now in litigation in the case of Edw. P. Ferry *vs.* John L. Street, being lots 15 and 16 and lot B, in block 22, and the south half of lot 1, in block 23, being 100 feet by 150 feet

that he has read the affidavit of Edwd. P. Ferry herein concerning the same; that the same is true and that the actual value of the property therein described will not exceed in value the sum of thirty-five hundred dollars.

And further deponent saith not.

A. B. EMERY.

Subscribed and sworn to before me this 22d day of September, 1886.

[SEAL.] JOS. M. COHEN,
Notary Public, Summit Co., Utah.

Endorsed: A. B. Emery. Filed Sept. 27, 1886. E. T. Sprague, clerk.

82 In the Supreme Court of the Territory of Utah.

EDWARD P. FERRY, Plaintiff, *vs.* JOHN L. STREET, Defendant.

TERRITORY OF UTAH, } ss:
County of Summit, }

Edward P. Ferry, being duly sworn, says: I am the plaintiff in the above-entitled action. I am the owner th-ough a United States patent and subsequent deeds, and claim the possession of lots fifteen (15) and sixteen (16) and lot "B" in block twenty-two (22), and south half ($\frac{1}{2}$) of lot one (1), block twenty-three (23), according to the amended plot of Park City, being the same descriptions of land that are the subject of litigation in the above-entitled case, and is as near as may be one hundred (100) feet by one hundred and fifty feet in measurement. I have been conversant and acquainted with the value of property in Park City continuously since May, 1874, and since July, 1878, I have been a resident of the said Park City; that the improvements upon the said described property when the above suit was commenced consisted of one log house, one story high, size 16x24, one frame shanty, one story high, size 12x18;

83 that property immediately adjoining the above has been sold *for* at prices ranging from ten (10) to fifteen (15) dollars per foot, and that at the time the suit was commenced twelve $\frac{50}{100}$ dollars per foot was a fair valuation of the frontage on Main street, making the (100) one hundred feet front worth $1,250.00; that the improvements could not be valued at more than $500.00; that at the present time, with the advance in the value of property that has taken place since the suit was commenced, twenty (20) dollars per foot front is all that the property is worth, and the improvements at the same figure make the whole valuation twenty-five hundred dollars; that during the month of November, 1885, after the suit had been decided in favor of the plaintiff by the third district court and the same affirmed by the supreme court of the Territory, and pending a petition for a rehearing before the supreme court (which has subsequently affirmed the decision of the lower court), John L. Street, having been appointed postmaster, put up a shanty

building for the post office, one story high, size 16x22, and
84 that within the present month he has raised his old frame building and is now engaged in putting up another frame building on the said property, evidently with the intention of making the improvements, added to the value of the real estate, amount to five thousand dollars, in order to enable him to an appeal from the supreme court of the Territory to the United States Supreme Court.

Affiant further says that at the present time the true value of the property will not exceed as follows: 100 feet frontage on Main street, $2,000.00; one log house and one frame building, the first occupied as a dwelling house by Street and the latter as a Chinese wash house, valued at 500.00; post-office building, put up in month of Nov., 1885, 400.00; new building, now in process of erection, one story high, size 10x16, 150.00; total value at this date, three thousand and fifty dollars.

And further deponent saith not.

EDW'D P. FERRY.

Subscribed and sworn to before me this 21st day of September, 1886.

[SEAL.] JAMES MOFFAT,
Notary Public

Endorsed: Edward P. Ferry *vs.* John L. Street. Affidavit of Edward P. Ferry. Filed 27 Sept., 1886. E. T. Sprague, clerk.

85 In the Supreme Court of the Territory of Utah.

EDWARD P. FERRY, Plaintiff, *vs.* JOHN L. STREET, Defendant.

TERRITORY OF UTAH, }
County of Summit, } *ss:*

James T. Kescel, being duly sworn, deposes and says that he is a resident of Park City and has so resided there for a period of eight years; that he is over 21 years of age; that he is marshal of said Park City; that he is well acquainted with the value of property in Park City and with the property in dispute in the case of Edw. P. Ferry *vs.* John L. Street, being lots 15 & 16 and lot "B" in block 22, and the south half of lot 1, block 23, being 100 feet by 150 feet; that he has read the affidavit of Edw'd P. Ferry herein concerning the same; [that the same] is true, and the value of said described property therein will not exceed three thousand dollars.

And further deponent saith not.

JAMES T. KESCEL.

Subscribed and sworn to before me this 22d day of September, 1886.

[SEAL.] JAMES MOFFAT,
Notary Public, Summit County, Utah Ter.

Endorsed: James T. Kescel. Filed Sept. 27th, 1886. E. T. Sprague, clerk.

86 In the Supreme Court of the United States.

EDW'D P. FERRY, Plaintiff, *vs.* JOHN L. STREET, Defendant.

TERRITORY OF UTAH, } *ss:*
County of Summit, }

A. B. Richardson, being duly sworn, deposes and says that he is over 21 years of age, and resides in Park City, and has been a resident of said Park City for the period of — years; that he is cashier of the Park City Bank; that he is well acquainted with the valuation of property in Park City, and with the property in litigation in the above-entitled action, being lots 15 and 16 & lot B in block 22, and the south half of lot one in block 23, being 100 by 150 feet; that he has read the affidavit of Edward P. Ferry herein concerning the same; that the same is true, and that the value of the described property will not exceed three thousand and fifty dollars.

A. B. RICHARDSON.

Subscribed & sworn to before me this 22d day of September, A. D. 1886.

[SEAL.] JOS. M. COHEN,
Notary Public, Summit Co., Utah.

Endorsed: A. B. Richardson. Filed Sept. 27, 1886. E. T. Sprague, clerk.

87 In the Supreme Court of the Territory of Utah.

EDWARD P. FERRY, Plaintiff, *vs.* JOHN L. STREET, Defendant.

TERRITORY OF UTAH, } *ss:*
County of Summit, }

Frank H. White, being duly sworn, deposes and says that for the year 1886 *I* was the assessor of Park City, having been duly appointed and qualified; that in the discharge of *my* official duties the following-described property, to wit, dwelling-house, frame building, and post office, and lots fifteen and sixteen, block twenty-two, and the south half of lot one, block twenty-three, *was* assessed by *me* and returned to the board of equalization for the city, and by them ratified and approved, at the sum of $800.00 *dollars*, which *I* deemed, judged, and determined was a fair valuation of the said property for assessment purposes.

FRANK H. WHITE.

Subscribed and sworn to before me this 22d day of Sept., 1886.

[SEAL.] JAMES MOFFAT,
Notary Public, Summit County, Utah T'y.

Endorsed: Frank H. White. Filed Sept. 27, 1886. E. T. Sprague, clerk.

88 In the Supreme Court of the Territory of Utah.

EDWARD P. FERRY, Plaintiff, *vs.* JOHN L. STREET, Defendant.

TERRITORY OF UTAH, } ss:
County of Summit, }

Jos. M. Cohen, being duly sworn, deposes and says that for the year 188– *I* was the assessor of Park City, having been duly appointed and qualified; that in the discharge of *my* official duties the following-described property, to wit, dwelling-house, frame building, and post office, and lots fifteen and sixteen and lot B, block twenty-two, and the south half of lot 1, block twenty-three, *was* assessed by *me* and returned to the board of equalization for the city, and by them ratified and approved, at the sum of five hundred dollars, which *I* deemed, judged, and determined was a fair valuation of the said property for assessment purposes, which is not less than one-half of cash value.

JOS. M. COHEN.

Subscribed & sworn to before me this 22d day of Sept., 1886.
[SEAL.] JAMES MOFFAT,
Notary Public, Summit County, Utah Ter.

Endorsed: Jos. M. Cohen. Filed Sept. 27th, 1886. E. T. Sprague, clerk

89 In the Supreme Court of the Territory of Utah.

EDWARD P. FERRY, Plaintiff, *vs.* JOHN L. STREET, Defendant.

TERRITORY OF UTAH, } ss:
County of Summit, }

Frank E. James, being duly sworn, deposes and says that he is a resident of Park City, and has so resided there for a period of six years; that he is over the age of 21 years old; that he is police justice and recorder of Park City; that he is well acquainted with the value of property in Park City and with the property in dispute in the case of Edw'd P. Ferry *vs.* John L. Street, being lots 15 & 16 and lot B in block 22, and the south half of lot 1 in block 23, being 100 feet by 150 feet; that he has read the affidavit of Edw'd P. Ferry herein concerning the same; that the same is true, and the said described property therein will not exceed in value the amount of three thousand ($3,000.00) dollars.

And further deponent saith not.

FRANK E. JAMES.

Subscribed and sworn to before me this 22d day of September, 1886.
[SEAL.] JAMES MOFFAT,
Notary Public, Summit County, Utah Ter.

Endorsed: Frank E. James. Filed Sept. 27th, 1886. E. T. Sprague, clerk.

90 In the Supreme Court of the Territory of Utah.

EDWARD P. FERRY, Plaintiff, *vs.* JOHN L. STREET, Defendant.

TERRITORY OF UTAH, } ss:
County of Summit, }

James G. Watson, being duly sworn, deposes and says that he is a resident of Park City, and has so resided there for a period of 11 years; that he is over the age of twenty-one years *old*; that he is a farmer; that he is well acquainted with the value of property in Park City and with the property in dispute in the case of Edw'd P. Ferry *vs.* John L. Street, being lots 15 & 16 and lot B in block 22, and the south half of lot 1, block 23, being 100 feet by 150 feet, and that he has read the affidavit of Edward P. Ferry herein concerning the same; that the same is true, and will not exceed in value the amount of $3,000.00 *dollars.*

And further deponent saith not.

JAMES G. WATSON.

Subscribed & sworn to before me this 22d day of Sept., 1886.

[SEAL.] JAMES MOFFAT,
Notary Public, Summit County, Utah Ter.

Endorsed: James G. Watson. Filed Sept. 27, 1886. E. T. Sprague, clerk.

91 In the Supreme Court of the Territory of Utah.

EDWARD P. FERRY, Plaintiff, *vs.* JOHN L. STREET, Defendant.

TERRITORY OF UTAH, } ss:
County of Summit, }

Murray Shepherd, being duly sworn, deposes and says that he is a resident of Park City, and has so resided there for a period of six years; that he is over 21 years of age; that he is a book-keeper and accountant by profession; that he is well acquainted with the value of property in Park City and with the property in dispute in the case of Edw'd P. Ferry *vs.* John L. Street, being lots 15 & 16 and lot B in block 22, and the south half of lot 1, block 23, being 100 feet by 150 feet; that he has read the affidavit of Edw'd P. Ferry herein concerning the same; — is true, and the value of said described property therein will not exceed three thousand dollars.

And further deponent saith not.

MURRAY SHEPHERED.

Subscribed & sworn to before me this 22d day of Sept., 1886.

JAMES MOFFATT,
Notary Public, Summit County, Utah Ter.

Endorsed: Murray Shephered. Filed Sept. 27th, 1886. E. T. Sprague, clerk.

92 In the Supreme Court of the Territory of Utah.

EDWARD P. FERRY, Plaintiff, *vs.* JOHN L. STREET, Defendant.

TERRITORY OF UTAH, } ss:
County of Summit, }

Chester H. Withey, being duly sworn, deposes and says that he is a resident of Park City, and has so resided there for a period of six years; that he is over the age of 21 years *old;* that he is secretary [of the] Crescent Mining Co.; that he is well acquainted with the value of property in Park City, and with the property in dispute in the case of Edw'd P. Ferry *vs.* John L. Street, being lots 15 & 16 and lot B in block 22 and the south half of lot 1, block 23, being 100 feet by 150 feet; that he has read the affidavit of Edw'd P. Ferry herein concerning the same; that the same is true, and said property will not exceed in value the amount of three thousand dollars.

And further deponent saith not.

CHESTER H. WITHEY.

Subscribed & sworn to before me this 22d day of Sept., 1886.

[SEAL.] JAMES MOFFAT,
Notary Public, Summit County, Utah Ter.

Endorsed: Chester H. Withey. Filed Sept. 27, 1886. E. T. Sprague, clerk.

93 In the Supreme Court of the Territory of Utah.

EDWARD P. FERRY, Plaintiff, *vs.* JOHN L. STREET, Defendant.

TERRITORY OF UTAH, } ss:
County of Summit, }

Thomas Stringer, being duly sworn, deposes and says that he is a resident of Park City, and has so resided there for a period of six years; that he is over the age of 21 years *old;* that he is assayer and superintendent [of the] Crescent Sampling Mill; that he is well acquainted with the value of property in Park City, and with the property in dispute in the case of Edw'd P. Ferry *vs.* John L. Street, being lots 15 & 16 and lot B in block 22 and the south half of lot 1, block 23, being 100 feet by 150 feet; that he has read the affidavit of Edw'd P. Ferry herein concerning the same; that the same is true, and will not exceed in value the amount of three thousand dollars.

And further deponent saith not.

THOS. M. STRINGER.

Subscribed & sworn to before me this 22d day of Sept., 1886.

[SEAL.] JAMES MOFFAT,
Notary Public, Summit County, Utah Ter.

Endorsed: Thomas M. Stringer. Filed Sept. 27, 1886. E. T. Sprague, clerk.

94 In the Supreme Court of the Territory of Utah.

EDWARD P. FERRY, Plaintiff, *vs.* JOHN L. STREET, Defendant.

TERRITORY OF UTAH, }
County of Summit, } *ss:*

Thomas Cupit, being duly sworn, deposes and says that he is a resident of Park City, and has so resided there for a period of ten years; that he is over 21 years of age; that he is well acquainted with the value of property in Park City and with the property in dispute in the case of Edw'd P. Ferry *vs.* John L. Street, being lots 15 and 16 and lot B, in block 22, and the south half of lot 1, block 23, being 100 feet by 150 feet; that he has read the affidavit of Edw'd P. Ferry herein concerning the same; — is true, and the value of said described property therein will not exceed thirty-five hundred dollars.

And further deponent saith not.

THOMAS CUPIT.

Subscribed & sworn to before me this 22d day of Sept., 1886.

[SEAL.] JAMES MOFFAT,
Notary Public, Summit County, Utah Ter.

Endorsed: Thomas Cupit. Filed Sept. 27th, 1886. E. T. Sprague, clerk.

95 In the Supreme Court of the Territory of Utah.

EDWARD P. FERRY, Plaintiff, *vs.* JOHN L. STREET, Defendant.

TERRITORY OF UTAH, }
County of Summit, } *ss:*

O. L. Brown, being duly sworn, deposes and says that he is a resident of Park City, and has so resided there for a period of eight years; that he is over the age of 21 years *old;* that he is the ore receiver and supply agent of the Crescent Co.; that he is well acquainted with the value of property in Park City and with the property in dispute in the case of Edw'd P. Ferry *vs.* John L. Street, being lots 15 & 16 and lot B, in block 22, and the south half of lot 1, block 23, being 100 feet by 150 feet; that he has read the affidavit of Edw'd P. Ferry herein concerning the same; that the same is true, and that the total value of said property will not exceed the amount of three thousand dollars.

And further deponent saith not.

OTIS L. BROWN.

Subscribed & sworn to before me this 22d day of September, 1886.

JAMES MOFFATT,
Notary Public, Summit County, Utah Ter.

Endorsed: O. L. Brown. Filed Sept. 27th, 1886. E. T. Sprague, clerk.

96 In the Supreme Court of the Territory of Utah.

EDWARD P. FERRY, Plaintiff, *vs.* JOHN L. STREET, Defendant.

TERRITORY OF UTAH, } ss:
County of Summit, }

Joseph M. Cohen, being duly sworn, deposes and says that he is over 21 years of age and a resident of Park City, and has so resided there for the period of six years; that he has been engaged in the real estate business for the past 2 years; that he is thoroughly and well acquainted with the valuation of property in and around Park City; that he is the agent for and fixes the prices upon unsold lots in the original plat of Park City and in Snyder's addition thereto, and that for the past two years, having from the nature of his business been required to know the value of all property within the limits of the city, *and that* scarcely a week during that time has elapsed but that he has made sales of lots within the said city, and no sale has been made by him of lots fronting on Main street (the street upon which the property in dispute fronts) at exceeding $20.00 per foot, while many sales have been made at a much less price
97 per foot front; that he is well acquainted with the property in dispute in the case of Edw'd P. Ferry *vs.* John L. Street, being lots 15 & 16 and lot "B," in block 22, and the south half of lot 1, block 23; that the value of the described real estate will not exceed $2,000; that the value of the improvements thereon will not exceed the sum of one thousand dollars. JOS. M. COHEN.

Subscribed & sworn to before me this 22d day of September, 1886.
[SEAL.] JAMES MOFFAT,
Notary Public, Summit County, Utah Ter.

Endorsed: Joseph M. Cohen. Filed Sept. 27, 1886. E. T. Sprague, clerk.

98 In the Supreme Court of the Territory of Utah.

EDWARD P. FERRY, Plaintiff, *vs.* JOHN L. STREET, Defendant.

TERRITORY OF UTAH, } ss:
County of Summit, }

Edward A. Shear and John Graham, being duly sworn, each for himself doth depose and say that they are residents of Park City, and have resided there for the space of seven years; that they are carpenters and builders by profession, and therefore competent to judge of the value of buildings erected or in course of construction; that at the request of Edw'd P. Ferry they have estimated the value of improvements on lots 15 and 16 and lot B in block 22, and the south half of lot 1 in block 23, Park City, and the same consists of—

Log house, valued at	$200
China wash-house	125
Post-office building	225
New building in course of construction	100
Total value of improvements	$650 00

And further deponent- saith not.

EDWARD A. SHEAR.
JOHN GRAHAM.

Subscribed and sworn to before me this 22d day of Sept., 1886.
JAMES MOFFAT,
Notary Public, Summit County, Utah Ter.

Endorsed: E. A. Shear, John Graham. Filed Sept. 27, 1886. E. T. Sprague, clerk.

99 In the Supreme Court of the Territory of Utah.

EDWARD P. FERRY, Plaintiff, *vs.* JOHN L. STREET, Defendant.

TERRITORY OF UTAH, } ss:
County of Summit, }

Wilson I. Snyder, being duly sworn, deposes and says that for the year 1884 *I* was the assessor of Park City, having been duly appointed and qualified; that in the discharge of *my* official duties the following-described property, to wit, log dwelling-house and frame building, and lots fifteen and sixteen and lot B, block twenty-two, and the south half of lot one, block twenty-three, *was* assessed by *me* and returned to the board of equalization of the city, and by them ratified and approved, at the sum of five hundred dollars, which *I* deemed, judged, and determined was a fair valuation of the said property for assessment purposes, which is not less than one-half of cash value, and that said valuation was fixed and agreed upon between said Street and *myself* after a conversation between *us* to that end.

WILSON I. SNYDER.

Subscribed and sworn to before me this 22d day of Sept., 1886.
[SEAL.] JAMES MOFFAT,
Notary Public, Summit County, Utah Ter.

Endorsed: Wilson I. Snyder. Filed Sept. 27, 1886. E. T. Sprague, clerk.

100 In the Supreme Court of the Territory of Utah.

EDWARD P. FERRY, Plaintiff, *vs.* JOHN L. STREET, Defendant.

TERRITORY OF UTAH, } ss:
County of Summit, }

James Moffat, being duly sworn, deposes and says that he is over 21 years; that he is a resident of Park City, county and Territory aforesaid, and that he has resided there for the last six years; that he is book-keeper by occupation; that he is well acquainted with the value of property in Park City and with the property in litigation in the case of Edw'd P. Ferry *vs.* John L. Street, being lots 15 & 16 & lot B, in block 22, and the south [half] of lot one, block 23, being 100

feet by —; that he has read the affidavit of Edward P. Ferry herein concerning the same; that the same is true, and that the actual value of the said described property will not exceed the sum of three thousand and fifty dollars.

And deponent further saith not.

JAMES MOFFAT.

Subscribed & sworn to before me this 22d day of Sept., 1886.

[SEAL.] JOSEPH M. COHEN,
Notary Public, Summit County, Utah.

Endorsed: E. P. Ferry *vs.* John L. Street. Affidavit of James Moffat. Filed Sept. 27, 1886. E. T. Sprague, clerk.

101 In the Supreme Court of the Territory of Utah.

EDW'D P. FERRY, Plaintiff, *vs.* JOHN L. STREET, Defendant.

TERRITORY OF UTAH, } *ss:*
County of Summit, }

Henry Newell, being duly sworn, deposes and says that he is over the age of 21 years *old;* that he is a resident of Park City, and has resided there for the last six years *past*; that he is a butcher by profession and carrying on a butcher business; that he is well acquainted with the value of property in Park City and with the property in dispute in the case of Edw'd P. Ferry *vs.* John L. Street, being lots 15 & 16 & lot B, in block 22, and the south half of lot 1, block 23, being 100 feet by 150 feet; that he has read the affidavit of Ed'd P. Ferry herein concerning the same; that the same is true, and that the actual value of the said described property will not exceed the sum of three thousand and fifty (3,050) dollars.

And further deponent saith not.

HENRY NEWELL.

Subscribed & sworn to before me this 21 day of September, 1886.

[SEAL.] JAMES MOFFAT,
Notary Public, Summit County, Utah.

Endorsed: E. P. Ferry *vs.* J. L. Street. Affidavit of Henry Newell. Filed Sept. 27th, 1886. E. T. Sprague, clerk.

102 TERRITORY OF UTAH, } *ss:*
County of Salt Lake, }

I, E. T. Sprague, clerk of the supreme court of Utah Territory, in pursuance of an appeal allowed in the case of Edward P. Ferry *vs.* John L. Street, lately pending in said court, do return attached hereto a transcript of the record and proceedings, opinions, bonds, supersedeas, and to clerk affidavits as to value of matter in dispute made by J. L. Street, F. W. Hoyt, T. H. Watson, W. H. Roy, H. Shields, J. H. Rogers, A. B. Emery, E. P. Ferry, J. T. Kescel, A. B. Richardson, F. H. White, J. M. Cohen, F. E. James, J. G. Watson, M. Shepherd, C. H. Withey, T. M. Stringer, T. Cupit, O. L. Brown, J. M.

Cohen, E. A. Shear and J. Graham, W. I. Snyder, I. Moffat, and Henry Nowell, together with the original citation, all in and of said court and cause, to the Supreme Court of the United States, and I hereby certify that said attached transcript of said record and proceedings, opinions, bonds, and affidavits is a true, full, correct, and complete copy of the several originals thereof on file or of record in my office.

In witness whereof I hereunto set my hand and affix the seal of the supreme court of Utah Territory this 28th day of September, A. D. 1886, at Salt Lake City.

[Seal Supreme Court United States of America, Territory of Utah.]

E. T. SPRAGUE,
Clerk of Supreme Court of Utah Territory.

Endorsed on cover: Utah Territory supreme court. No. 1079. John L. Street, appellant, *vs.* E. P. Ferry. Filed October 6, 1886.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

JOHN L. STREET, Appellant,
vs.
E. P. FERRY. } No. 1079.

Affidavits of Value.

In the Supreme Court of the United States of America.

JOHN L. STREET, Appellee,
vs.
EDWARD P. FERRY, Respondent.

TERRITORY OF UTAH, }
County of Summit, } *ss:*

George J. Barry, being duly sworn, deposes and says he is a resident of Park City, said county and Territory, and has so resided in said town for about six years last past; that he is well acquainted with the property in Park City, said county & Territory, and with the property in dispute in the case of E. P. Ferry *vs.* John L. Street, and has full knowledge of the value of city lots on Main street of said city, and know- the present valuation to be on *on* an average of thirty dollars per foot front, and deponent would value the four lots fronting on Main street at ($40) forty dollars per foot front, or four thousand dollars, and also values the four back lots at ($10) ten dollars per foot front, and would value the improvements on said eight lots at two thousand dollars.

G. J. BARRY.

Subscribed and sworn to before me this 3rd day of November, A. D. 1886.

[Seal. D. P. Whedon, Notary Public, Summit Co., Utah.]

D. P. WHEDON,
Notary Public, Summit Co.. Utah.

[Endorsed:] U. S. Supreme Court. John L. Street, appellant, *v.* E. P. Ferry, appellee. Affidavit of George J. Barry in the case of Ferry *vs.* Street as to the value of the property in dispute.

[Stamped:] Office Supreme Court U. S. Filed Nov. 12, 1886. James H. McKenney, clerk.

In the Supreme Court of the United States of America.

JOHN L. STREET, Appellee, *vs.* E. P. FERRY, Respondent.

TERRITORY OF UTAH, } *ss:*
County of Summit, }

John L. Street, being duly sworn, deposes and says that he is the defendant in the above-entitled action, appellee herein.

That respondent and plaintiff has filed a number of affidavits as to the value of the property in dispute, stating the value of improvements and of the said property erroneously and far below their actual value and cost, *that* in addition to his former affidavit, and giving a more particular discription of the property in dispute, and of the improvements thereon.

That he has resided on said property over twelve years last past contineously, and is acquainted with the value of property in said town of Park City.

That the said disputed property is centrally located and is in the center of the business portion of the said town.

Adjoining the said property in dispute is the large store building of Phillip Shwartz, and adjoining him—extending northerly—is an almost solid block of business houses and hotel, built of wood, brick, and stone; also, on the south, adjoining said disputed property, is the large saloon building of A. Mosher, Charles Shields' general merchandise store, and adjoining Shields the Society Hall, a large two-story building with basement room used as a skating rink, size of said building 40 x 75, with addition on the rear of 20 x 40 feet, and adjoining and extending south from said hall are an almost solid block of business houses.

On the opposite side and immediately in front of said property in dispute is the large two-story building of W. H. Bennett, 24 x 50 feet; [on] a lot north of it is the large two-story building of Wiseman, about the same size, and north of it business houses, and about eight lots, is the large fire-proof brick store two stories high, 50 x 90, but back, owned by M. S. Aschheim, general merchandise, and extending south from the said building of Bennett's are contineous business houses—one in course of erection.

20 feet of a vacant lot adjoining Bennett's house and directly opposite said disputed property is valued by its owner, E. P. Clark, at ($700) seven hundred dollars, and no ground near the post-office (which is situated upon the property disputed) is worth less than thirty dollars per foot front by seventy-five feet deep—the size of all the lots in said town, in accordance with the plat of Park City, of record in the office of the county recorder of said Summit county.

And deponant further says that he has on the said property in dispute the following improvements, to wit: One hewed log house, 1½ story, 16 x 25 feet, built in 1874, and additions thereto, consisting of a frame kitchen 10 x 14, one story; also one hewed log room 8 x 14 feet—the house and additions limed and papered & ceiled and tin roof on kitchen; also a cellar under said house, 10 x 14 feet and 7 seven feet high; well about 18 or twenty feet deep; one log stable,

with outhouses and fencing & grading; also one hundred feet of sidewalk, which cost party ($40) forty dollars. All of said improvements deponent values at seven hundred and forty dollars ($740.00); and further says that he built a post-office building on said property soon after his appointment as postmaster at Park City, about a year ago last past, which building cost him ($740) seven hundred and forty dollars; also one frame building adjoining said post-office, valued at ($200) two hundred dollars; also one-story frame or branch store building—cost ($300) three hundred dollars; said building and also the post-office building finished with store fronts, large plate-glass, and the best Truckee lumber; also the post-office partitions and desk and lock-draw-s built in the lower part of said partition; said post-office building is 18 x 24 feet & 14 feet high; that said disputed property upon which said improvements are situated, is a piece of ground one hundred feet, fronting on Main street, by one hundred and fifty feet deep, four lots twenty-five (25) feet by (75) seventy-five feet, fronting upon Main street, and (4) four lots in the rear, of (25) feet by (75) seventy-five feet, the said four lots fronting on Main street, valued at thirty ($30.00) [per] foot, ($3,000.00); four lots in the rear, one thousand dollars ($1,000); total, $4,000; improvements, $1,720; total, $5,720.

JOHN L. STREET.

Subscribed & sworn to before me this 3d day of November, 1886.
[Seal D. P. Whedon, Notary Public, Summit Co., Utah.]

D. P. WHEDON,
Notary Public, Summit County, Utah.

[Endorsed:] U. S. Supreme Court. E. P. Ferry *vs.* J. L. Street. Affidavit of John L. Street, appellee, as to the value of the property in dispute.

[Stamped:] Office Supreme Court U. S. Filed Nov. 12, 1886. James H. McKenney, clerk.

In the Supreme Court of the United States.

E. P. FERRY, Appellant, *vs.* JOHN L. STREET, Appellee.

TERRITORY OF UTAH, } ss:
County of Summit, }

F. C. Thompson, being duly sworn, says he is a resident of Park City, in said county & Territory, and has so resided since the month of June, 1882, 4 years last past; that he is conversant and acquainted with the value of property in said town, and especially on Main street, in the vicinity of the property in dispute in the above-named action; that he resides near the said property, & has been doing business in a hundred feet of said property during his residence in said place; that the property in that part of town is more valuable than in any other portion, and is valued at, and he believes is worth, thirty dollars per front foot, by seventy-five feet deep; that he would not take that price per foot for his lot.

And deponent says that he values and believes the lots or ground in the rear and included in the disputed property is worth the sum of $1,000 (one thousand dollars), and the front lots on Main street (25 x 75), one hundred feet front by seventy-five feet deep, are well worth ($4,000) four thousand dollars, and believes, from his knowledge of the value of property on the part of Main street near the said disputed property, that the said property in dispute, with the improvements thereon, was well worth the sum of $5,500 & more prior to the rendition of the judment rendered by the territorial supreme court against said Street during July or August last past.

F. C. THOMPSON.

Subscribed and sworn to before me this 5th day of November, A. D. 1886.

[Seal Henry Shields, Notary Public, Summit County, Utah.]

HENRY SHIELDS,
Notary Public, Summit County, Utah.

[Endorsed:] U. S. Supreme Court. John L. Street, appellant, *v.* Edward P. Ferry, respondent. Affidavit of F. C. Thompson as to the value of the property in dispute.

[Stamped:] Office Supreme Court U. S. Filed Nov. 12, 1886. James H. McKenney, clerk.

In the Supreme Court of the United States.

EDWARD P. FERRY, Pl'ff, *vs.* JOHN L. STREET, Def't.

TERRITORY OF UTAH, } *ss:*
County of Summit, }

Frank H. White, being duly sworn, deposes and says that he is a resident of Park City, said county & Territory, and is justice of the peace of Park City precinct, in said county of Summit, Utah Territory; that he is acquainted with and knows the value of property in said Park City, and on Main street and adjoining near and in the vicinity of the property in dispute in the above-entitled action; that the price of lots in the vicinity and adjoining said disputed property command a better price than any other in Park City, ranging from ($30 to $35) thirty to thirty-five dollars per front foot on Main street, extending seventy-five (75) feet back, and deponent believes that said lots are worth that price.

And deponent further says that he values the said disputed property as follows, and believes it to be worth said sum or amount, to wit: ($3,000.00) three thousand dollars per (100) one hundred feet front on Main street and seventy-five feet back, and one thousand ($1,000.00) dollars for the lots or ground in the rear of the above-named lots on Main street, and the improvements fourteen to fifteen hundred dollars ($1,400) or ($1,500), and the total amount at ($5,400.00 or $5,500.00) five thousand and four or five hundred dollars at the rendition of the judgment against Street in territorial

supreme court, in July or August of 1886, said disputed ground measuring as near as can be (100 x 150 feet), one hundred feet on Main street and one hundred & fifty feet east or back from Main street.

FRANK H. WHITE.

Subscribed and sworn to before me this 5th (fifth) day of November, A. D. 1886.

[Seal D. P. Whedon, Notary Public, Summit Co., Utah.]

D. P. WHEDON,
Notary Public, Summit County, U. T.

[Endorsed:] U. S. Supreme Court. John L. Street, appellant, *v.* E. P. Ferry, appellee. Frank H. White's affidavit as to the value of the property in dispute.

[Stamped:] Office Supreme Court U. S. Filed Nov. 12, 1886. James H. McKenney, clerk.

In the Supreme Court of the United States.

E. P. FERRY, Appellant, *vs.* JOHN L. STREET, Appellee.

TERRITORY OF UTAH, }
County of Summit, } ss:

Joseph F. Robinson, being duly sworn, deposes and says that he is a resident of Park City, and constable of Park City precinct of said county of Summit, and has resided in said town since the year A. D. 1877 continuously; that he is conversant and well acquainted with the value and general price of property in Park City, and especially on Main street, on which street he resides, near the U. S. post office, which is situated on the disputed property in the above-named action between Street & Ferry, which is in the central portion of said town and in the center of the business part of town; that the lots on Main street adjoining and near the said property in dispute, to wit, lots (15 & 16) fifteen & sixteen and lot ("B") in block (22) twenty-two, & (20) feet twenty *feet* of the south portion of lot (1) one, of block (23) twenty-three; lot "B" contains (30) thirty feet, the width of Fourth street, which ends opposite (on the west side of Main street), of said lot "B" (command the highest price); that the said property in dispute is (100) one hundred feet, fronting on Main street and opposite Fourth (4) street, and extends back or east (150) one hundred and fifty feet, making four (4) lots in the rear, and joining on the east ends of lots 15, 16, & lot "B," in block (22) twenty-two, & lot (1) one, in block (23) twenty-three; that deponent values and believes that the property in dispute & that adjoining and near it is worth $30 per foot front & more, and that the (4) lots adjoining & in the rear of said described lots fronting on Main street, in dispute in the above action, is worth ($10) ten dollars per foot, and that the said property in dispute, as above described by said deponent, with the improvements thereon, was worth the sum of ($5,000) five thou-

sand dollars and over at the time of the rendition of judgment in favor of E. P. Ferry in the supreme court of Utah Territory during July or August last past (1886).

J. F. ROBINSON.

Subscribed and sworn to before me this 5th day of November, A. D. 1886.

[Seal Henry Shields, Notary Public, Summit County, Utah.]

HENRY SHIELDS,
Notary Public, Summit County, Utah.

[Endorsed:] Supreme Court of the United States. J. L. Street, appellant, *v.* E. P. Ferry, respondent. Affidavit of Jos. Robinson as to the value of the property in dispute.

[Stamped:] Office Supreme Court U. S. Filed Nov. 12, 1886. James H. McKenney, clerk.

In the Supreme Court of the United States.

EDWARD P. FERRY, Pl'ff, *vs.* JOHN L. STREET, Def't.

TERRITORY OF UTAH, }
County of Summit, } *ss:*

George Brasier, being duly sworn, deposes and says that he is over the age of twenty-one and has resided in Park City, said county & Territory, contiuously for & during ten years last past.

That he is well acquainted with the value of property in Park City; that the general price of lots on Main street, in the central business portion of said town, is from thirty to thirty-five dollars per front foot.

That the property in dispute in the above action is in the central portion of the business portion of Park City, and that property adjoining and in the vicinity of said disputed property is the most valuable in town, including two blocks on either side of the post office (which is situated upon the said disputed property), and deponent values the lots fronting on Main street adjoining and near the said disputed property (on which said J. L. Street resides and his resided for the last ten years past, to deponent's own knowledge) at $30 per front foot, seventy-five (75) feet back or depth, and that lots back of these that front on Main street are worth and deponent values them at ten ($10.00) [dollars] per foot, or ($250) two hundred and fifty dollars per lot, adjoining and in the neighborhood of the disputed property.

Deponent further says that he resides on Main street, a few hundred feet south of the said disputed property in the above-named action, and has carried on the business of bakery during most of the time of his residence in Park City, but at present is not following that business.

And deponent further says that he values and believes the improvements and the said disputed property is over ($5,000) five thou-

sand dollars at the time of the rendition of the judgment in favor of pl'ff in the territorial supreme court of said Territory.

And deponent further says that north on the adjoining block of the four back lots of the disputed property in this action is the large and extensive stamp mill of the Daly Mining & Milling Company, which was completed during the year last past, several months prior to the rendition of said judgment.

GEORGE BRAZIER.

Subscribed and sworn to before me this 4th day of November, A. D. 1886.

[Seal Henry Shields, Notary Public, Summit County, Utah.]

HENRY SHIELDS,
Notary Public, Summit County, Utah.

[Endorsed:] U. S. Supreme Court. J. L. Street, appellant, *vs.* Ed. P. Terry, respondent. Affidavit of George Brasier as to the value of the property in dispute.

[Stamped:] Office Supreme Court U. S. Filed Nov. 12, 1886. James H. McKenney, clerk.

In the Supreme Court of the United States.

JOHN L. STREET, Appellee,
vs.
EDWARD P. FERRY, Respondent.

TERRITORY OF UTAH, }
County of Summit, } ss:

Charles E. Street, being first duly sworn, deposes and says that he is a resident of Park City, Utah, and has so resided for twelve years last past; that he is over twenty-one years of age, and that he is well acquainted with the property in Park City, Utah, and with the property in dispute in the case of Edward P. Ferry *vs.* John L. Street, and that he is well acquainted with the value of said properties; that there is immediately adjoining or near the said property in dispute the following-described improvements, to wit: On the same side of the street and north, separated by a narrow alley, the large general merchandise store of P. Swartz, 24x50 feet in size, with fire-proof celler, being the first of one continuous block north of the best business houses of Park City; on the same side of the street and south and adjoining is the large building of A. Mosher, with the general merchandise store of Charles Shields next adjoining, and the large two-storey Society Association building, costing $10,000.00, next adjoining, with business houses adjoining continuously, extending south for a distance of over one block; on the opposite side of the street from the aforementioned & same property in dispute there is a large two-storey building, the property of W. H. Bennett, and other business houses north and south of same nearly continuous: that the said property in dispute is situated in the most central and business portion of the town of Park City;

that the said John L. Street has now on the property in dispute improvements and buildings as follows: One hewed log house, 25 x 16 feet in size, one and a half stories high, lined, papered, and ceiled inside, with additions, to wit: one frame kitchen, 8 x 14 feet, with tin roof; one hewed log bed-room, 8 x 14 feet, lined and papered inside; also, one celler under house 10 x 14 feet and 7 feet deep, with one well 18 feet deep, one stable (log) 14x20 feet, with other outhouses, fences, and improvements by grading, all of which said deponent values at $700.00; that further there is also one frame building 18 x 24 feet with high ceiling, store front, built of Truckee lumber, extra thick red pine floor, lined with post-office-finished partition inside, well and substantially built throughout and used for the post-office at Park City, the actual cost of which was, to my certain knowledge, $740.00; also one frame house 10 x 20 feet, with an addition; also frame 10 x 14, which deponent values at $200.00; also one store building, built in September, 1886, and costing $300.00; also 100 feet of sidewalk, which cost $40.00. And deponent further says that all of the above-named improvements are upon the said property in dispute and that said property consists of ground 100 x 150 feet in size, and containing four lots of 25 feet each, fronting upon Main street, and 75 feet deep, or distance back from Main street, and four other lots of same size each (25 x 75) as above and being the back portion (or back lots) of said plot of ground; that he values the four front lots at $30.00 per foot front, or a total of $3,000.00, and the four back lots at $10.00 per foot, or a total of $1,000.00, and that it is a matter of record that adjoining ground, or that near by, has sold for $25.00 per foot front at different times in the past two and three years, and some has sold for more per foot; that it is now held and believed to be worth per foot, on Main street, in this section of Park city, by the owners of said ground adjoining or near the ground in dispute, *to be* not less than $30.00 *per foot*; that the size of all lots in Park City are 25 x 75 feet, in accordance with the plat of said town on record; that the total value of said land and improvements is $5,980.

CHARLES E. STREET.

Subscribed and sworn to before me this 3rd day of November, 1886.

[Seal D. P. Whedon, Notary Public, Summit Co., Utah.]

D. P. WHEDON,
Notary Public, Summit Co., Utah.

[Endorsed:] U. S. Supreme Court. E. P. Ferry *vs.* J. L. Street. Affidavit of Chas. E. Street.

[Stamped:] Office Supreme Court U. S. Filed Nov. 12, 1886. James H. McKenney, clerk.

In the Supreme Court of the United States.

FERRY *vs.* STREET.

TERRITORY OF UTAH, }
County of Summit, } *ss.*:

Philip Shwartz, being duly sworn, deposes and says that he is a resident of Park City, said county and Territory; is over twenty-one years of age, and has resided in said town about three years last past, and further says that he purchased the lot he now resides upon, adjoining the property in dispute between J. L. Street and E. P. Ferry, from D. C. McLaughlin on July 1st, A. D. 1884, for the sum of twenty-five dollars per foot (size of said lot 25 x 75), the deed of which is of record in the office of the recorder of said Summit county, Territory of Utah; also gave an additional sum of one hundred and fifty dollars for an old frame house in the back end of said lot, which was included in the same deed of conveyance. Deponent further says that he would not take thirty dollars a foot for his ground, and that he believes the ground in dispute, which adjoins his, is worth not less than thirty dollars per foot front by seventy-five feet back; and further deponent sayeth not.

PHILIP SHWARTZ.

Subscribed and sworn to before me this 3d day of November, A. D. 1886.

[Seal D. P. Whedon, Notary Public, Summit Co., Utah.]

D. P. WHEDON,
Notary Public, Summit Co., Utah.

[Endorsed:] U. S. Supreme Court. E. P. Ferry, appellee, *vs.* J. L. Street, appel. Affidavit of Philip Shwartz as to the value of the property in dispute.

[Stamped:] Office Supreme Court U. S. Filed Nov. 12, 1886. James H. McKenney, clerk.

Endorsed on cover: Supreme Court U. S., 1886. October term. No. 1079. John L. Street, appellant, *vs.* E. P. Ferry. Affidavits of value. Filed Nov. 12, 1886.

119-385

Office Supreme Court U. S.
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JAMES H. McKENNEY.
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1886.

JOHN L. STREET,
Appellant,

vs.

EDWARD P. FERRY,
Appellee.

APPEAL.

Appellant's Brief on Motion to Dismiss Appeal, and Reverse Judgment.

JOHN A. MARSHALL,
Attorney for Appellant.

In the Supreme Court of the United States.

OCTOBER TERM, 1886.

JOHN L. STREET,
Appellant,
vs.
EDWARD P. FERRY,
Appellee.

APPEAL.

Appellant's Brief on Motion to Dismiss Appeal, and Reverse Judgment.

Respondent moves to dismiss the appeal on the ground that "the value is not sufficient". That the value of the improvements made or the advanced value, since suit commenced, or since the trial in the lower court, should not be considered.

The appeal being from the judgment of the Supreme Court, jurisdiction depends upon the matter in dispute "between the parties as the case stands upon the writ of error or appeal," or as it stands in this court and not when the action was instituted.

Hilton vs. Dickinson, 108 U. S., 175.

At the time of trial, plaintiff (respondent) testified that the rent alone was of the value of twenty dollars per month, (see transcript) as at that time, there were no improvements,

except a log building, which he says was of little or no value; that meant ground rent alone. This would be $240 per annum, ground rent, which, at a fair value, estimated by the legal rate of interest—10 per cent.—would give the value of the ground alone, at that time, $2400. The complaint alleges value for the year and nine months prior to the commencement of the action, at $500 damages, and obtained judgment for that amount.

In his present affidavit he admits that property has advanced since then. The fact appears it has largely so. From the record, and valuable improvements since made, and situation of the property in the center of a prosperous and populous mining town, we think it fully appears that the matter in dispute exceeds five thousand dollars.

As to the second section of the act of March 3d, 1885, p. 443, involving the validity of any *patent*, etc.

The primary meaning of the word patent as originally used in England, signified any instrument conferring grants of *lands*, honors or franchises.

2 Bouvier, def. patent.

In the United States it is sometimes understood to mean the title deed, by which the Government conveys its lands. Id.

We maintain whatever may have been its more general earlier acceptation, that under the land laws, especially the later, it is understood to apply as well where lands are in controversy, as where inventions are.

1st. The court will take judicial notice of the course of the land department by which it transfers the government title.

2d. The title to all lands is conveyed by patent. All of the statutes of the United States and the decision of the court when speaking of the manner by which the title to lands shall be transferred, speak of it as by *patent*.

See Pre-emption Act, Sections 2263, 2269, 2274, 2275, Revised Statutes.

Under the Homestead Act.

Sections 2291, 2292, 2301, 2305, 2308, 2316 and 2317.

Under the Mineral Act.

Sections 2325, 2332, 2333, 2337, 2340, and Section 2370, providing for sale of public lands.

From previous acts, we think Congress understood the word patent at the passage of the act of March 3rd, 1885, to include all kinds of instruments whereby the government conveys its title.

There is no reason why the Supreme Court should not have jurisdiction to pass upon patents for land, as well as for inventions.

As to the second proposition. That the judgment should be affirmed, on the ground that the appeal was taken for delay, and the errors frivolous, an examination of the record will convince the court otherwise, and the fact that appellee is continuing to make improvements,shows his good faith, as to the errors being frivolous, the Supreme Court of the Territory certainly did not consider them so, for it was held by it for over one year and a half, and after being decided once a rehearing was granted, and then held under advisement for several months before it could arrive at any conclusion.

II.

That the judgment should be reversed.

This is an action of ejectment, for lands located on Section 16, founded on a United States patent. Said patent was obtained with Valentine Scrip, which can only be located upon lands *unoccupied, unappropriated,* and *not mineral.* See evidence and U. S. Statutes, vol. 17 p. 648.

The answer sets up that at the time of the location of said Scrip, the lands were occupied as a townsite, having several hundred inhabitants residing upon the same. That on or about the 10th of November, 1874, said premises being within the limits of Park City, defendant entered upon the same,and

ever since has occupied and possessed the same, and that said lands are mineral.

On the trial, the patent of plaintiff was objected to, as being void upon its face, being for Section 16, said lands having been reserved from sale, being mineral, and also appropriated by Congress for school purposes.

Defendant offered to prove, that said lands at the time of the location of said Scrip were occupied, were mineral, and that defendant was interested in a mining claim or location embracing the premises in controversy and set forth in the complaint. All of which was objected to by plaintiff, and the objection sustained by the court, to which defendant excepted.

The questions to be decided are:

1st. Said lands being on Section 16 of school lands were they reserved from sale and appropriated for school purposes, or appropriated at all.

2d. Did the court err in refusing to allow defendant to prove that said lands were mineral and were occupied at the location of said Scrip.

3d. Did the court err in refusing to allow defendant to answer the qurstion: "State whether or not you are interested in any mining claims or locations embracing the premises in controversy and described in the complaint."

We maintain that the court erred in its decision on each of said questions.

I.

As to the first: Sections numbered 16 and 36 in each of the Territories, etc., "*Shall be reserved* for the purpose of being applied to schools in the several Territories, and in the States *hereafter to be erected out of the same.*"

Sec. 1946, Revised Statutes, Comp. Laws p. 48.

In the Organic Act the language is, "it shall be, and the same *are hereby* reserved, for the purposes, etc." Sec. 13, Organic Act p. 34.

In this case the patent being for lands on Section 16, they were reserved from sale, were appropriated; were issued without authority of law, and the officers had no authority to issue the same.

It has always been the policy of the Government to set aside Section 16 of every township for the maintenance of public schools. The ordinance of 1785 being the first enactment.

Cooper vs. Roberts, 18 How. 177.

And ever since said section has been held, reserved from sale and purchase. Id.

The above suit was in ejectment for a part of Section 16. The court says, plaintiff's case affirms, that this section had been *appropriated* to the State of Michigan for the use of schools. P. 176.

The *appropriation* of public lands, for that object, became a fundamental principle by the ordinance of 1787, which settled the terms of compact between the people and States of the Northwestern territory, and the original States, *unalterable except by consent.*

18 How. p. 177.
21 Wal. 660, 670.

This was enforced on Ohio, prior to its admission, while a Territory, and Congress ever since in the organization of its Territories, has kept this principle in view, to consecrate the central section of every township to the same purpose, and it has entered into no obligation which would prevent it. Id. p. 178.

And no Territory ever has, or can be admitted as a State without accepting the obligation.

In Ham vs. State of Missouri, 18 How. 126, the court in commenting upon the acts of March 6th, 1820, and July 19th, 1820, says, "that it amounts *not merely to a grant for the use* of schools, of the 16th Section, *but to a positive condition or man-*

date, so far as Congress can make it, for the dedication of those sections to that object." P. 131.

"Such lands were *appropriated* to a *specific* and *permanent purpose*, and as to these lands, sales, and every other disposition, inconsistent with such dedication, were *expressly inhibited.*" Id. 131, 132.

The instructions, given and refused in that case (p. 130), which the Supreme Court say, were correct, decide that the various Acts of Congress with reference to Section 16, operate as a grant, for the use of schools, and that such reservation, attaches to *private* land claims which had previous to such donation, been claimed by individuals.

In Kissel vs. St. Louis Public Schools, 18 How. p. 19, the court says: By the Act of 1812 the towns acquired the *promise* of, and an *imperfect* title to certain *vacant* lands that might be *found* to *exist* when *surveyed.* And though no conclusive boundaries had been established, but depended for their specific identity on surveys to be executed by the Government. P. 25.

In 11 Mich., p. 186, in the case of the Minnessoto Mining Company vs. The National Mining Company, which was an a tion of ejectment by plaintiff, on a patent from the United States, for part of Section 16, it was held, following Cooper vs. Roberts, above, "that the United States are not authorized, either by pre-emption or otherwise, to sell any lands which *might on survey fall within* Section 16.

The lands were *appropriated.*

Wilcox vs. Jackson, 13 Pet., 498, 512, 513.
9 How., 539, 174, Gains vs. Nicholson.

The reservation and appropriation applies to the Territories, as well as States.

The language of the various statutes is, that sections numbered 16 and 36 shall be reserved *or*, they shall be and hereby are reserved to be applied to schools, etc. In either case it is *an appropriation* and gives an inchoate title, in the latter it is a grant. 21 Wal., 660-670.

In all the cases cited above, the land was reserved by act of Congress, while the repective States were Territories.

Section 16, was dedicated first by the ordinance of 1785 to the Northwest Territory.

Again by act of Congress of 1802, prior to the admission of Ohio. 1 Stats., 550. 18 How., 177. 21 Wal., 660, 670.

In Ham vs. Missouri, the acts cited and relied on, were passed March 3, 1811, March 6th, 1820, and July 19th, 1820. All prior to the admission of Missouri.

In Kissel vs. St. Louis Public Schools, the questions arose under ths acts of Congress of June 13, 1813, 1824, and 1831.

In the Minnessota Mining Co.,vs. The National, 11 Mich., under the acts of June 23rd, 1836, while a Territory, and the subsequent act of 1847.

It is immaterial whether the lands have been surveyed or not, when the location is made the adverse claim attaches, *except where settlement has been made under the pre-emption act.*

In 11th Mich. above, the plaintiff who claimed a U. S. patent and selection made in 1845, insisted, that until the 16th section had been identified by survey of public lands, the Federal Government had power to dispose of such lands.

The survey was not made until 1847. But the court says, "from the policy of the government it was never intended to authorize the sale by the United States of any lands which *might fall within* Sec. 16."

In Kissel vs. St. Louis Schools, the act reserving certain lands was passed in 1812, they were not surveyed until 1840. The school lands were not *designated* until 1843, an entry was made in 1836, under the pre-emption laws of 1814 and 1816, yet the court held that such lands were *appropriated* and not subject to sale or entry. P. 27.

In the United States vs. Carpenter, 111 U. S., 349. "The lands were reserved, the entry void. *It matters* not whether the lands had been *surveyed* or *not.*"

But these lands were surveyed and Section 16 known when located with the scrip. The *northern line* of *Section* 16 *had been run officially.* Section 9 and the tier of sections

north, in the same township had been surveyed and returned to the land office officially and the whole section surveyed prior to location.

See testimony of Brooks and Sutherland.

Where the United States agreed to grant a certain quantity of lands to be selected after the lands had been surveyed, but before they were surveyed or selected, to the reservee deeded his interest, it was held, his title passed.

Doe vs. Wilson, 23 How., 457.

The language of the acts reserving Sections 16 and 36 to the Territory, effectually withdrew said lands from sale, and on the admission of the Territory, it would become the owner absolutely.

Higging vs. Houghton, 25 Cal., 260.
Thompson vs. True 48 Cal., 601.

The act setting aside Sections 16 and 36 to the Territory, makes no provision for other lands to be taken in lieu of those sections, as in many of the States, and Washington Territory. Revised laws, Section 1497, showing that they were not to be disposed of except to actual settlers—under the pre-emption law where settlement was made prior to the survey.

II.

The court erred in rejecting the proof of defendant that the premises were occupied as a town and were mineral lands.

It will be contended that defendant does not sufficiently connect himself with the paramount title to raise these issues. He does, we contend, and that the rule requiring defendant to connect himself with the paramount title does not apply to this case, or this class of cases.

The Valentine act was for the benefit of an individual. It only operates in favor of a private person. It was there-

fore a private statute, and must be plead and proven like any other fact. The court cannot take judicial notice of it.

1 Kent., 260.

2 Bouv., 21 N. Y., 206.

It is only evidence against Valentine and the government, and not against strangers, or defendant or third persons.

1 Wharton, §§ 635 and 636.

Plaintiff then, in order to establish his own patent and title, must introduce evidence *dehors* the patent. The defendant then, in order to defeat the patent, can also introduce evidence *dehors* the patent, and the rule that no evidence *dehors* the patent, can be given to defeat it, does not apply to this class of cases, where the party relying upon the patent, must himself, go outside of the patent for evidence to sustain it. That rule can only apply to cases where the patent is valid upon its face, and founded upon a *public statute* of which the court will take judicial notice, and not upon a private act, which must be proven. And all of the cases, which invoke this principle, are cases arising on public statutes of which the court will take judicial notice.

The mining act of 1872, Revised Statutes Section 2318, provides that "In all cases lands valuable for mineral shall be reserved from sale, except as otherwise expressly directed by law."

That the Valentine act was a private statute, and should be found as any other fact, is recognized by plaintiff and the court, for the court in its findings of fact finds "that Frederick A. Nims purchased of Valentine, *scrip entitling him to enter forty acres of unappropriated land*," etc., as a fact in the findings.

In this case or class of cases, the plaintiff being compelled to introduce testimony *dehors* the instrument to establish his title, the defendant must be allowed the same privilege, and he may show any facts which will show the patent, upon which plaintiff's title rests, to be void.

The mining act above quoted, Section 2318, reserves all mineral lands from sale, except as therein provided. If not acquired under the mineral laws, it is *void.*

Where mineral lands are expected, the officer has no authority to issue patent, and it is *void.*

Morton vs. Nebraska, 21 Wal., 661, 671.
United States vs. Mullan, 7 Sawyer, 466.

The law applies equally to *salines, mineral lands, school, military and lands settled upon for purposes of trade and commerce,* having *been previously reserved.* The officers had no authority to issue patent, and this want of power may be shown in ejectment.

Morton vs. Nebraska, 660, 670, 675.

III.

But defendant had sufficient interest to attack the patent and plaintiff's title. Defendant asked the following questions of defendant, which was objected to and sustained.

"State whether or not you are interested in any mining claims or locations, embracing the premises in controversy and described in the complaint?"

This question if allowed to be answered would have connected defendant directly, with the paramount title, and allowed him to show any facts which would show the lands reserved, appropriated, or the patent void.

1st. That the lands were occupied, and not such as provided for by the Valentine Act.

That the lands were *mineral,* and therefore the patent *void.*

In order that a party may connect himself with the paramount title, to attack a patent, it is only necessary, "that he shall possess some right, *title, interest, or claim* in or to the lands that is permitted by the laws of the United States.

Robinson vs. Forrest, 29 Cal., 320.

In the above case, defendant offered to prove that he

settled upon the land as a pre-emptioner, and that the lands were *swamp lands*. It was refused and held error. That it was a portion of the evidence necessary to connect himself, etc., with the title.

If plaintiff's patent was obtained as for agricultural lands, as such, it did not convey the title to any minerals or precious metals contained therein.

Gold Hill Mining Company vs. Ish 5 Oregon, 104.
Hendenfeldt vs. Daney Gold and S. M. Co., 10 Nev. 290, 93 U. S. 634.

The mineral lands are reserved from sale except under the mining act.

Section 2322 Revised Statutes, provides that locators, etc., shall have the *exclusive right of possession* and enjoyment of all the surface within their location.

And the locator of a mining claim becomes the assignee of the United States, and his right to the possession of the land is full and complete.

Chapman vs. Toy Long, 4 Saw. 28.

In Belk vs. Meagher, 104 U. S. 284, speaking of a mining location, the Supreme Court says: "The possession of this property was just as much withdrawn from the public domain as the fee is by a valid grant from the United States, or the possesion by a valid and subsisting homestead pre-emption entry. A location when perfected has the effect of a grant from the United States," etc.

If defendant was in possession then under a mining claim or location, his possession was just as good, and his title was as good, as though under a patent from the United States, and he was in a position to attack any claim or title which might be brought against him.

The patent being for land reserved, was issued without authority of law, and void. The officer had no authority to grant it.

Patterson vs. Winn, 11 Wheat. 380.

United States vs. Stone, 2 Wal. 535.
Stoddard vs. Chambers, 2 How. 318.
Parker vs. Duff, 47 Cal. 554, 562.

And it is competent for the defendant, in an action of ejectment to attack the validity of the patent, on the ground that the land was excepted from the grant.

McLaughlin vs. Heid, 63 Cal. 208.

In the above case the defendant had not even pre-empted or filed upon the land, but as he had tried to, the Supreme Court said, he had sufficient interest to attack a patent.

It can be shown that lands are *swamp* in suits for possession, why not then that they are mineral lands.

Thornton vs. Thurston, 28 Cal. 603.
Kyles vs. Tibbs, 23 Cal. 432.
Robinson vs. Forrest, 29 Cal. 320.

The validity of a patent purporting to grant lands which the officers had no authority, may be controverted in any action directly or indirectly. The patent is void and defendant in ejectment may prove the facts showing its invalidity.

Carr vs. Quigley, 57 Cal., 394.
McLaughlin vs. Heid, 63 Cal., 208.

Appellant's points are these: Plaintiff has a patent for a part of 16th Section for which he has no right, being obtained for land reserved, appropriated, occupied and mineral.

He was not allowed to prove his title to the same, or that he had a claim thereon, or that it was mineral land, or to connect himself with the paramount title.

JOHN A. MARSHALL,
Attorney for Appellant.

United States vs. Stone, 2 Wal. 535.
Stoddard vs. Chambers, 2 How. 318.
Parker vs. Duff, 47 Cal. 554, 562.

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He was not allowed to prove his title to the same, or that he had a claim thereon, or that it was mineral land, or to connect himself with the paramount title.

JOHN A. MARSHALL,
Attorney for Appellant.

119-385

Office Supreme Court U. S.
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In the Supreme Court

OF THE UNITED STATES.

1079

OCTOBER TERM, A. D. 1886.

JOHN L. STREET, appellant,
~~Plaintiff in error,~~
vs.
EDWARD P. FERRY,
~~Defendant in error.~~

ON APPEAL.

BRIEF FOR APPELLEE ON MOTION TO DISMISS APPEAL OR AFFIRM THE JUDGMENT.

J. G. SUTHERLAND,
ARTHUR BROWN,
Attorneys for Appellee.

Star Print.

In the Supreme Court

OF THE UNITED STATES.

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vs.
EDWARD P. FERRY, ~~Defendant in error~~.

ON APPEAL.

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The motion to dismiss the appeal is made on the ground that the case is not appealable under the provisions of the Act of March 3d, 1885.

Laws 2 Sess., 48th Cong., p. 443.

I.

"The matter in dispute, exclusive of costs" is not of sufficient value, as appears by affidavits on file.

The affidavits on both sides were filed after the allowance of the appeal in the court below; so that the appeal cannot be supposed to have been allowed at all on the value. The affidavits are filed by the ~~appellant~~ appellee to sustain the appeal on a new ground.

They do not fix the value at any stated sum exceeding five thous-

and dollars. The estimates of the affiants cannot be regarded as being for any sum in particular above that stated; it is enough more in their judgment to satisfy the jurisdictional condition mentioned in the first section of the act of Congress just referred to.

In arriving at this conclusion stress is laid on the fact that valuable improvements have been made on the premises. All of these except the log house have been recently made—and made mostly since the judgment was rendered against the plaintiff in error in the trial court. Even including the value of these improvements, we are warranted in saying the value is not sufficient to sustain the jurisdiction. The conflict in the affidavits probably should not prevent the court from considering them with a view to a determination of the fact on which jurisdiction depends. The case in this respect does not fall within the reasoning of the court, in Gage vs. Pumpelly, 108 U. S, 164; nor of Zeigler vs. Hopkins, 117 U. S., 689; for there the court below passed upon the question of value in allowing the appeal. Here the appeal was allowed in the absence of these affidavits; they are now brought originally before the court, after allowance of appeal on another ground, to sustain the jurisdiction on the ground of sufficient value of the "matter in dispute."

The value added since the litigation commenced, by erection of a building upon the premises in dispute, ought to be excluded from the estimate, for the same reason that costs are not included. As affecting this question, it is a surreptitious enhancement of value.

Ogelsby vs. Helm, 26 La Ann, 61.
Schmidt vs. Brown, 33 id. 218.
Produce Bank vs. Morton, 67 N. Y., 199.
Knapp vs Bank 2 How 73

If the value of the recent improvements is excluded then there is *no showing that the value of the matter in dispute exceeds five thousand dollars.*

II.

The case is not within the second section of the act of March 3d, 1885.

So far as that section provides for an appeal on the ground of in-

volving the validity of a *patent*, it is manifestly confined to patents for *inventions*.

This appeal was allowed because the validity of a *land* patent was involved.

If the appeal be not dismissed, we contend that the judgment should be affirmed on the ground that the appeal was taken merely for delay, and the supposed errors frivolous.

The appellee was the plaintiff below; the action was ejectment, and he obtained judgment for the restitution of the premises in dispute. His evidence was a patent from the government to Frederick A. Nims; a deed fron Nims to him, and that the defendant was in hostile possession. The defendant set up no claim of title. He was a mere intruder—a squatter.

I.

The patent was not void on its face

The whole contention of the plaintiff in error rests on a denial of this proposition.

The patent purports to have been issued upon a location with Valentine scrip, which was applicable to any "unoccupied and unappropriated land of the United States," not mineral, surveyed or unsurveyed.

The ground on which it was supposed to be invalid on its face was that Congress had appropriated the land by including in the act organizing the Territory of Utah this provision; "That when the land in said Territory shall be surveyed under the direction of the government of the United States, preparatory to bringing the same into market, sections numbered sixteen and thirty-six in each township in said Territory shall be, and the same is hereby reserved for the purpose of being applied to schools in said Territory, and in the States and Territories hereafter to be erected out of the same."

St. at Large, p.

This is not a grant *in presenti*. Congress merely declares an intention. It could at any time repeal this provision To the extent that

mining claims may be located under the act of 1866 or 1872, and, as we contend, to the extent to which any private appropriation is authorized and actually made before the extension of the general system of public surveys to the land so taken, this provision of the Organic Act is modified.

Hydenfeldt vs. Daney G. & S. M. Co., 93 U. S., 634.
Frisber vs. Whitney, 9 Wall., 187.
Yosemite Valley Case, I5 id. 75.
Keystone Consolidated vs California, Copp M. L., 102.

The appellee's grantor, Nims, was authorized to appropriate to himself the forty-acre parcel, which includes the premises in dispute, while unsurveyed, by locating it with Valentine scrip. The findings show that he did so appropriate it, and that it was made to appear as a part of section sixteen only by the subsequent extension to it of the general system of public surveys.

The court below so decided.

Pacific Rep. 571.
See also 7 id. 712, 9 id. 299.

The conclusion arrived at appears to be sound and to be supported by principle and authority.

II.

The matters of fact offered to be proved by the defendand below, who is the ~~plaintiff in error~~ were inadmissible in the action of ejectment, and were unavailable in any action to him, as he did not connect himself with the source of title.

Smelting Co. vs. Kemp, 104 U. S., 636.
Rohall vs. Dilla, 114 id 51.
Sparks vs. Pierce, 115 id. 408.
Steel vs. Smelting Co. id. 447.

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J. G. SUTHERLAND,
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Of Counsel for Appellee.

119-380

Supreme Court, U. S.
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JAMES H. McKENNEY,

IN THE

SUPREME COURT

—OF THE—

UNITED STATES.

OCTOBER TERM, 1886.

JOHN L. STREET, Appellant,
vs.
EDWARD P. FERRY.

Appellee's Brief in Reply to Appellant's Brief.

J. G. SUTHERLAND,
ARTHUR BROWN,
Of Counsel for Appellee.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

JOHN L. STREET,
Appellant,
vs.
EDWARD P. FERRY.

APPELLEE'S BRIEF IN REPLY TO APPELLANT'S BRIEF.

I. As to jurisdiction. Neither the nature nor value of the matter in dispute is such as to give jurisdiction.

It is evident from appellant's brief that he does not contend that the value of the matter in dispute was $5,000 at the time judgment was rendered; but on the ground that the accruing damages, the increase in value, and the improvements, *since the judgment*, make the value now $5,000.

We contend that the evidence of value does not warrant the conclusion that the matter in dispute is now of the value of $5,000. But we also contend that the value at the time of the judgment is the test of jurisdiction. If it is a money judgment recovered by the

plaintiff, the amount of that judgment, exclusive of costs and interest, is the test of jurisdiction.

Knapp vs. Banks, 2 How., 73.
Railroad Co. vs. Wood, 100 U. S., 112.
Cook vs. Woodrow, 5 Crouch, 13.
Merrell vs. Petty, 16 Wall, 338, 348.
Josner vs. Conner, 75 N. Y., 158.
The Potapsco, 12 Wall., 451.
The Rio Grande, 19 Wall, 178.
Walker vs. U. S., 4 Wall, 164.
Hilton vs. Dickinson, 108 U. S., 165.

In the first of these cases, Mr. Justice Story said: "We can not look beyond the time of the judgment in order to ascertain whether a writ of error lies or not."

Where property is the subject of the judgment, doubtless its value should be determined at the same point of time in the proceedings as when there is a money judgment.

In Bank of the United States vs. Daniel, 12 Pet., 51, the Court says: "The Act of Congress provides that appeals shall be allowed to the Supreme Court from final decrees rendered in the Circuit Courts in cases of equity jurisdiction, where the matter in dispute, exclusive of costs, shall exceed the sum or value of $2,000. The expression "sum or value of the matter in dispute," has reference to the date of the decree below, alike in cases of appeals in equity and writs of error at law; they are each grounded on the original process of this court operating on the final decree or judgment, and are limited to the sum or value then in controversy, and of which the decree or judgment furnishes the better evidence, should it furnish any."

Peyton vs. Robertson, 9 Wheat, 527.
Cook vs. U. S., 2 Wall, 218.

Though the word *patent* is applied to all grants, whether of lands or franchises, it is obviously used in a restricted sense in the Act of March 3, 1885, relative to appeals from Territorial Courts. Its association with the word "copy" before "rights" implies that it was intended to include only what is usually meant by "patent rights." In popular usage, the expression denotes only rights under patents for inventions.

II. The merits. The judgment below should be affirmed.

The patent contested on the trial was founded on a location made with Valentine scrip issued under the private Act passed by Congress for the relief of Thomas B. Valentine, April 5th 1872.

17 U. S. pt 649

That scrip was applicable to any unoccupied and unappropriated non-mineral lands, whether surveyed or unsurveyed.

So far as its regular issuance depended on facts, the land officers were charged with the duty, and possessed a jurisdiction to ascertain them. As to the appellant, who was the defendant below, and in this form of action, the patent is conclusive that those facts existed. Quinby v. Conlan 104 U.S. 420

Baldwin v. Stark 107 id 463

Steel vs. Smelting Co., 106 U. S., 454.

Green v. Hay 11 Pac. Rep. 716; Jeffords v. Hinie 11 Pac Rep 357

The patent is conclusive evidence that the land was unoccupied, non-mineral, and not appropriated by any proceedings *in pais*, or in the land office.

The whole contention of appellant to show the invalidity of the patent was that there was an "appropriation" of the land by *law*, in legislation of Congress relating to the Territory of Utah.

Section 15 of the Organic Act is as follows:

"When the lands in said Territory shall be surveyed under the direction of the government of the United States, preparatory to bringing the same into market, Sections numbered sixteen and thirty-six, in each township in said Territory, shall be, and the same are hereby reserved, for the purpose of being applied to schools in said Territory, and in the States and Territories hereafter to be created out of the same."

It is in these words in the Revised Statutes:

"SEC. 1946.—Sections numbered sixteen and thirty-six in each township of the Territories of New Mexico, Utah, Colorado,

Dakota, Arizona, Idaho, Montana and Wyoming, shall be reserved for the purpose of being applied to schools in the several Territories herein named, and in the States and Territories hereafter to be created out of the same."

These Sections contain no grant or appropriation. Neither is effectual to divest the title of the government either before or after survey. And therefore the cases of Cooper vs. Roberts, 18 How., 177, and other like cases, have no application.

The Valentine scrip was located on a parcel including the premises in question before the public surveys had extended to the section in which it is situated. Therefore, the land officers were not apprised that the parcel was within the purpose declared by the Sections which have been quoted.

Hydenfeldt vs. Daney G. and S. M. Co., 93 U. S., 634.

The Interior Department held and still holds that those sections vest no title in the Territory.

June Hodgert, 1 Copp. Pub. L. Laws, 629.
Keystone Consolidated vs. California, Copp. Min. L., 100, 105.

If the title remained in the government it was within the power of Congress to dispose of it by subsequent legislation.

There is no contract or grant in the sections referred to. The word "reserve" is not one implying a grant. It is not an apt word to express an intention to part with the thing reserved, but the contrary; it implies that the thing is held back: kept in store or *retained* by the party reserving.

In particular instances this word and the context have shown an intention to except parts of an area and dispose of them, finally, in a manner different from the disposition which is made of the area generally. Many Indian treaties afford instances of such reservations. They contain tribal cessions with reservations to particular individuals of small parts of the land ceded.

Stockton vs. Williams, 1 Dong., Mich., 546.
S. C. Walk. Ch., 120.

In Trustees for Vincennes University vs. The State of Indiana, 14 How., 268, a reservation was effectual as a grant. The case is thus stated in the opinion:

"The Indian Territory was organized by the Act of Congress

of the 7th of May, 1800, with the power to legislate given by the ordinance of 1787. On the 26th of March, 1804, an Act of Congress was passed for the survey and disposal of the public lands, by which three land districts were established, and an entire township in each was reserved for the use of a seminary of learning, to be located by the Secretary of the Treasury. The boundaries of the Vincennes land district were the same as designated in the late treaty with the Wabash Indians. The Secretary of the Treasury by letter of the 10th of October, 1806, located township No. 2, south of range 11 west, in Gibson County, for the use of a seminary in that district.

"The act of the 29th of November, 1806, and the supplement thereto, passed the 17th of September, 1807, established Vincennes University, and incorporated the same by the name of "The Board of Trustees of the Vincennes University." The corporation was duly organized at Vincennes, on the 6th of December, 1806, under the act, and has since continued. The second section of the act of incorporation, after reciting the seminary lands under the Act of Congress, provided 'that the trustees, in their corporate capacity, or a majority of them, should be legally authorized to sell, transfer, convey and dispose of any quantity, not exceeding 4,000 acres, of said land, for the purpose of putting into immediate use the university; and to have or rent the remaining part of said township to the best advantage, for the use of said public school or university.'"

The Court declares the effect of these facts—"In virtue of the above Acts, the complainants became possessed of the said township of land, and so continued during the territorial government." In another part of the opinion the Court says: "There was no uncertainty in the appropriation. The township was designated, and the purpose stated, for which it was reserved. And there can be no doubt, from the authorities, that the right vested so soon as a capacity was given to the corporation to receive it; prior to this it remains in the Federal Government. This is the settled doctrine on that subject."

Vincennes University was a private corporation, and it was held to be the intended reservee. The designation of the section, the organization of the corporation and its acceptance of the donation, executed the intention of Congress. Therefore, the reservation took effect as a grant. It was irrevocable and protected by the Federal Constitution as a contract.

The case of Kissel vs. St. Louis Public Schools, 18 How., 19, did not proceed on a general reservation for the use of schools. In

that case there were three Acts of Congress, the last of which provides directly for transferring the title to the beneficiency. Doe vs. Wilson, 23 How., 457, is like Stockton vs. Williams, *supra*, except that the United States agreed to issue patents to the reservees, and did so.

The grant in question in Cooper vs. Roberts, 18 How., 173, was an explicit grant to the State of Michigan for the use of schools. It was a matter of solemn compact between the United States and the State in connection with her admission into the Union.

The grant was the same to the State of Missouri, in Ham vs. Missouri, Id. 126. United States vs. Carpenter, 101, U. S. 347, involves a reservation in the nature of a grant in favor of specific parties.

These cases, and it is believed all others on the subject, recognize, or at least do not antagonize the proposition, almost self-evident, that in every valid grant there must be a grantor capable of making the grant, a grantee capable of taking it, and a thing granted capable of identification with reasonable certainty.

The reservation in question is not to a private person or corporation, nor to any reservee whatever, except the United States. The word "reserve" is used in its popular sense. The government directed the retention of the areas found by survey to be sections 16 and 36, for the purpose of being applied to the use of schools. It was not a reservation to the Territory nor to the prospective state to be erected out of the same. The lands were to be devoted to a public object, not more a matter of state than national concern. The manner of applying the land to the object, what public agency should be employed to effect it, or what class of schools should have the support, was not prescribed. The land would have to be sold and the proceeds held and administered for that object. It could be done by the United States.

The reservation merely excepted those sections, when ascertained and numbered, from the operation of the general laws regulating the disposal of public lands after survey—after they have been "surveyed under the direction of the government of the United States, preparatory to bringing the same into market."

"Territories are but political subdivisions of the outlying dominion of the United States. Their relation to the general government is much the same as that which counties bear to the respective States, and Congress may legislate for them as a State does for its municipal organizations."

National Bank vs. Yankton, 101 U. S., 133.

Congress had power to repeal Section 15 of the Organic Act of Utah Territory; and, indeed, the whole Act; to abolish the Territorial Government; to repeal Section 1946, U. S. R. S.

The purpose declared by these proposed reservations might be changed, or even abandoned: the enactment conferred no rights, no title perfect or inchoate.

People vs. Tevey, 8 Mich., 124.

Grants of a section in each township for schools have heretofore been uniformly made to the States, and these grants have provided for including other equivalent lands for such as have been sold prior to the grant. See Sec. 2275 U. S. R. S.

Congress has assumed the power to sell unsurveyed lands, and to direct the patenting of parts of the school sections to persons who made settlements thereon prior to the survey.

The Act passed April 5th, 1882, for relief of George G. Snyder, directs a patent for a part of the section 16, now in question.

The acts providing for the sale of mineral lands make no exception of areas included in the school sections afterwards ascertained. The act for the relief of Thomas B. Valentine provides for scrip applicable in the same manner to unsurveyed lands, without exception of lands that may be found after survey to be parts of the school sections.

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